Supreme Court, U.S.
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No. ____

In the

Supreme Court of the United States

JOHN DREBICK and JANE DOE DREBICK,
husband and wife, d/b/a DREBICK INVESTMENTS,

Petitioners,

v.

CITY OF OLYMPIA, a Washington code city,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Washington

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May a local government avoid the "nexus" and "rough proportionality" tests of *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), by imposing development exactions in the form of "impact" fees?

2. May a local government avoid the "nexus" and "rough proportionality" tests of *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), by imposing development exactions by legislative enactment?

LIST OF ALL PARTIES

Petitioners: John Drebick and Jane Doe Drebick, husband and wife, d/b/a Drebick Investments.

Respondent: City of Olympia, a Washington Code city.

RULE 29.6 STATEMENT

Drebick Investments is a sole proprietorship, wholly owned by John Drebick and Jane Doe Drebick, husband and wife. Petitioner company has no parent company and no publicly held company owns 10% or more of Petitioner's stock.

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PETITION FOR WRIT OF CERTIORARI

John Drebick and Jane Doe Drebick, husband and wife, d/b/a Drebick Investments (Drebick) respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of the State of Washington.

OPINIONS BELOW

The opinion of the Supreme Court of Washington is reported at 126 P.3d 802 (Wash. 2006), Appendix (App.) A. The Washington Supreme Court's unreported order denying Drebick's petition for rehearing and modifying the opinion is reproduced as App. B. The opinion of the Court of Appeals of Washington, Division 2, is reported at 83 P.3d 443 (Wash. Ct. App. 2004), App. C. The Final Judgment, Findings of Fact and Conclusions of Law, and Letter Opinion of the superior court were not published, but are included in App. D. The Findings and Decision of the Hearing Examiner of the City of Olympia are reproduced as App. E.

JURISDICTION

The opinion of the Supreme Court of Washington was filed on January 19, 2006, and became final on April 13, 2006, upon entry of the Court's denial of the Petition for Reconsideration, App. F. This petition is timely under Supreme Court Rule 13. On June 20, Justice Kennedy granted Drebick's timely application to extend the time within which to file the petition to and including August 11, 2006. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The Fifth Amendment to the United States Constitution provides in pertinent part: "[N]or shall private property be taken for public use without just compensation."

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part: "nor shall any state deprive any person of life, liberty, or property, without due process of law."

Revised Code of Washington, section 82.02.020, is set out in App. G.

Revised Code of Washington, section 82.02.050(3), is set out in App. H.

INTRODUCTION

The Washington Supreme Court ruled in this case that the Fifth Amendment to the Constitution does not prohibit the exaction of "impact" fees as a condition to the use of private property, even where the fees are not related to any impact that might be caused by the development.

Almost 20 years ago, this Court issued its landmark ruling in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). Government regulation in *Nollan* took the form of an exaction—the California Coastal Commission imposed a condition requiring the property owner to dedicate a strip of beach in order to obtain a permit to rebuild his house. *Id.* at 827-28. This Court held that there must be a close connection between the condition imposed on the use of land and the social evil that would otherwise be caused by the unregulated use of the owner's property. *Id.* at 837. Without such a connection,

a permit condition is "not a valid regulation of land use but 'an out-and-out plan of extortion.'" *Id.* (citations omitted).

Seven years later, in *Dolan v. City of Tigard*, 512 U.S. 374 (1994), this Court defined how close a "fit" is required between the burdens imposed by a development exaction and the burdens created by a proposed development plan. Where a nexus is found, there must also be a "degree of connection between the exactions and the projected impact of the proposed development." *Id.* at 386. There must be rough proportionality—"some sort of individualized determination that the required dedication is related *both in nature and extent* to the impact of the proposed development." *Id.* at 391 (emphasis added).

This Court recently affirmed the viability of these Takings tests in the context of development exactions generally. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 548 (2005) ("[W]e reaffirm that a plaintiff seeking to challenge a government regulation as an uncompensated taking of private property may proceed . . . by alleging . . . a land-use exaction violating the standards set forth in *Nollan* and *Dolan*."). However, this clarification of Fifth Amendment regulatory takings law does not address the applicability of *Nollan* and *Dolan* to certain types of land-use exactions. Local governments and courts oftentimes limit the holdings of *Nollan* and *Dolan* to circumstances where exactions involve a dedication of land or a fee in lieu of dedication of land (versus impact fees) or where exactions are imposed individually (versus legislatively). Others apply the tests more broadly. This Court has not expressly endorsed either interpretation. *See Garneau v. City of Seattle*, 147 F.3d 802, 811 (9th Cir. 1998) ("[T]he Supreme Court has left unsettled the question whether *Dolan*'s rough proportionality test applies to legislative, as opposed to administrative exactions. Lower courts and commentators have also struggled to determine whether the test applies to fee exactions . . . ." (footnote omitted)).

STATEMENT OF THE CASE

In July, 1988, Drebick Investments sought approval from the City of Olympia to build a four-story, 54,698 square-foot office building near the City's boundary. App. at E-5. The City approved the proposal conditioned upon the payment of a transportation impact fee. *Id.* The fee, intended to improve City roads, was calculated according to the City's legislatively adopted fee schedule. *Id.* at E-8-E-14. The fee was not based on the direct impact of the Drebick office building on City roads; it was calculated by averaging the cumulative traffic-related impacts of all new expected commercial office space the City projected might be built over the next six years. *Id.* at E-13. Specifically, the total square footage of all new commercial office space likely to be built within the city's boundaries was divided into the cost of all road improvement projects that such space would necessitate within the city's boundaries. This calculation results in the average rate per square foot that each new office building must pay toward all of the City's road improvement projects, regardless of any particular building's traffic-related impacts. *Id.* at E-14. The impact fee required to be paid by Drebick totaled $132,328.98. *Id.* at E-13.

Drebick sought an adjustment from the Director of the Community Planning and Development Department, as permitted by City ordinance. App. at E-6. The Director rejected the request. *Id.* at E-7. Drebick then appealed to the Hearing Examiner of the City of Olympia. *Id.* at E-8. The hearing examiner noted a number of significant facts. First, Olympia's transportation impact fee (1) "does not depend on or vary with the location within the City of the development charged," *id.* at E-14, and (2) "does not depend on or take into account whether the development charged actually contributes any trips to any of the project groups on which the fee is based." *Id.* Additionally, under Olympia's method (3) "a transportation impact fee assessed a specific development may be based on the cost of projects to which that development will contribute no

traffic and which will not directly benefit that development," and (4) "a development contributing no traffic to any of the project groups on which the transportation impact fees are based would be charged the same impact fee as the same type and size development which did contribute traffic to those project groups." *Id.*

Drebick's appeal to the Hearing Examiner argued that the nexus and rough proportionality requirements of *Nollan* and *Dolan* apply to the impact fees assessed against its project. App. at E-46. The Hearing Examiner reversed the City of Olympia, *id.* at E-55, but did not reach the constitutional argument. *Id.* at E-46. Finding that the impact fee imposed on the Drebick project did not meet the statutory relationship and proportionality standards of Washington Revised Code section 82.02.050, the Hearing Examiner explained, it was not necessary to "decide whether *Nollan* and *Dolan* apply to impact fees." *Id.*

Both Drebick and the City of Olympia petitioned the Thurston County Superior Court for review of the Hearing Examiner's decision. App. at D-4-D-5.

A. The Trial Court Decision

The trial court reversed the Hearing Examiner's decision and reinstated the $132,328.98 impact fee. App. at D-2. Although Drebick again raised the constitutional issues of nexus and rough proportionality, the trial court did not reach the issue by determining that the fee is an excise tax, not a regulatory fee. *Id.* at D-6. The trial court acknowledged that if the fee were a regulatory fee, it must be reasonably related to the new development and must not exceed a proportionate share of the costs of system improvements that are reasonably related to the new development. *Id.* However, since the Court held that the "fee" actually is a tax, it could be assessed on a citywide system basis—proportionate and related to the City's

jurisdiction-wide need for new transportation improvements necessitated by new development. *Id.*

B. The Court of Appeals Decision

On appeal, Drebick relied on *Nollan* and *Dolan* to argue that the City could not impose a traffic impact fee without considering the traffic-related effects of the specific project. The City argued it did not have to consider the effects of Drebick's particular development because it was imposing a tax, not a fee. App. at C-3.

Finding this distinction immaterial, the Court of Appeals reversed the decision of the Superior Court, and sent the case back to the City to impose an impact fee that "shall not exceed the individualized impacts of Drebick's specific project." App. at C-4, C-23. The court reached its decision by analyzing both the legislative history of Washington Revised Code section 82.02.050(3) and the constitutionality of the statute. *Nollan* and *Dolan* "are the leading authorities on when it is constitutional to exact property by conditioning a permit." App. at C-15. " 'The ultimate goal is to show that the proposed condition or exaction . . . is reasonably related to all or part of an identified public problem that arises from . . . the development project.' " App. at C-18 (quoting *Burton v. Clark County*, 958 P.2d 343, 355 (Wash. Ct. App. 1998)).

The court concluded that *Dolan* applies to the exaction in this case, even though it "was money, not land, " App. at C-18, noting that if " 'the *Dolan* proportionality test does not apply, the government can exact conditions such as the one here with few limits.' " *Id.* at C-19 (quoting *Benchmark Land Co. v. City of Battle Ground*, 14 P.3d 172, 175 (Wash. Ct. App. 2000)).

C. The Washington Supreme Court Decision

The Washington Supreme Court reversed the Court of Appeals, and held that the City could base impact fees on area-wide infrastructure improvements without determining the

direct impact of a particular project. App. at A-1. The court's holding was based on its interpretation of the requirements of the local impact fee statutes (App. at A-8-A-11; App. at G and H), and on its refusal to apply the *Nollan* and *Dolan* standards to the exactions at issue (App. A-11-A-12).

The majority chastised the dissent for arguing that *Nollan* and *Dolan* apply to the fees in this case: "The dissent does not explain that neither *Nollan* nor *Dolan* concerned the imposition of impact fees but addressed instead the authority of a local government to condition development approved on a property owner's dedication of a portion of land for public use." App. at A-11-A-12. The majority cites *Ehrlich v. City of Culver City*, 911 P.2d 429, 444 (Cal.), *cert. denied*, 519 U.S. 929 (1996), for the proposition that *Nollan* and *Dolan* do not apply to legislatively prescribed development fees. *Id.* at A-12-A-13.

The dissent urged a constitutional construction of the local impact fee statutes. App. at A-33-A-37. Citing the Court of Appeals decision, the dissent noted that "the most important conclusion to be drawn from the legislative history is the legislature's deliberate use of the *identical* terms the United States Supreme Court used to describe the 'nexus' requirement of the Fifth Amendment: 'reasonably related to.'" App. at A-33. The majority, "defeats the *Nollan* and the Washington State Legislature's definition [of 'reasonably related']." App. at A-36.

REASONS FOR GRANTING THE WRIT

I

THERE IS A CONFLICT AMONG THE LOWER COURTS ABOUT WHETHER THE *NOLLAN* AND *DOLAN* STANDARDS APPLY TO MONETARY EXACTIONS

The Washington Supreme Court ruled that the Fifth Amendment's Takings Clause imposes no limits on the power of local government to exact money from property owners as a condition of exercising their constitutional right to use their property. The court admitted that this Court has not decided whether the nexus and rough proportionality tests in *Nollan* and *Dolan* apply to the type of fees at issue in this case—fees imposed to mitigate the direct impact of development. *City of Olympia v. Drebick*, 126 P.3d 802, 808 (Wash. 2006) (App. at A-12).

This Court has not decided the issues raised here, but this Court has addressed the constitutional standards that apply to development fees. In the early case of *Village of Norwood v. Baker*, 172 U.S. 269 (1898), this Court treated the taking of property in the form of fees the same as the taking of property in the form of land.

> In our judgment, the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking, under the guise of taxation, of private property for public use without compensation.

Id. at 279.

More recently, after granting certiorari in *Ehrlich v. City of Culver City*, 512 U.S. 1231 (1994), this Court vacated the judgment of a California court of appeal, and remanded the case for consideration under *Dolan v. City of Tigard*, 512 U.S. 374. The implication of the remand is that this Court approves of the application of the *Nollan* and *Dolan* standards to monetary exactions. *See* Stephen R. McCutcheon, Jr., *Lessened Protection for Property Rights—The Conjunctive Application of the* Agins v. City of Tiburon *Disjunctive Test*, 27 Pac. L.J. 1657, 1675 (1996) ("[T]he remand of *Ehrlich* intimates that the nexus and rough proportionality requirements . . . may be applicable to permits conditioned upon monetary exactions . . . ."); *see also* Matthew S. Watson, *The Scope of the Supreme Court's Heightened Scrutiny Takings Doctrine and Its Impact on Development Exactions*, 20 Whittier L. Rev. 181, 205 (1998) ("The *Ehrlich* remand seems to indicate the new exaction test refined in *Dolan* is just that—a new exaction test, not merely a new physical exaction test.").

The Washington Supreme Court's limitation of *Nollan* and *Dolan* to the exaction of real property ignores this Court's treatment of development fees, and directly conflicts with decisions of the California and Texas Supreme Courts. In *Ehrlich v. City of Culver City*, 911 P.2d at 444, the California Supreme Court upheld the application of *Nollan* and *Dolan* to fees imposed as a condition of development.[1] The owner of a private tennis club and recreational facility applied to the City of Culver City for an amendment to the general plan, a zoning change, and amendment of the specific plan to allow replacement of the tennis club and recreational facility with a condominium complex. *Ehrlich v. City of Culver City*, 15 Cal. App. 4th 1737, 1743 (1993), *vacated and remanded*, 512 U.S. 1231 (1994). The City approved the application conditioned

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[1] This California Supreme Court decision resulted from an appeal of the decision of the California Court of Appeal after remand from this Court.

upon the payment of certain monetary exactions, including a $280,000 fee to pay a portion of the cost of replacing the lost recreational facilities, and a $33,200 art in public places fee. *Id.* The California Supreme Court "reject[ed] the proposition that *Nollan* and *Dolan* are entirely without application to monetary exactions. When such exactions are imposed . . . on an individual and discretionary basis, we conclude that the heightened standard of judicial scrutiny of *Nollan* and *Dolan* is triggered." 911 P.2d at 444.

The Supreme Court of Texas, in a case involving the dedication of money for road improvements, found no reason to limit application of *Dolan* to a dedication of land. *Town of Flower Mound v. Stafford Estates Ltd. P'ship*, 135 S.W.3d 620, 635 (Tex. 2004). The Texas court did not "read *Dolan* even to hint that exactions should be analyzed differently than dedications in determining whether there has been a taking." *Id.*

The split of authority on this issue goes far beyond the states of Washington, California, and Texas. Courts in many other states have also weighed in on the issue with differing results.

1. Some Courts Agree with the Supreme Courts of California and Texas, Holding That *Nollan* and *Dolan* Apply to Fees

Ohio: Unlike the Washington Supreme Court, the Ohio Supreme Court explicitly adopted a test "based on the *Nollan* and *Dolan* cases." *Home Builders Association of Dayton and the Miami Valley v. City of Beavercreek*, 729 N.E.2d 349, 356 (Ohio 2000) (*Beavercreek*). The Ohio court considered the constitutionality of an ordinance that established "a system of impact fees payable by developers of real estate to aid in the cost of new roadway projects." *Id.* at 353. Specifically, the court considered the developers' assertion that "the ordinance produced an illegal taking of property without just

compensation in violation of the United States and Ohio Constitutions." *Id.* at 354. Like *Nollan* and *Dolan*, the test adopted by the Ohio court for impact-fee ordinances applies a "middle level of scrutiny" that considers whether there is a "reasonable connection" between needs and projected growth and between expenditures and benefits. *Id.* at 355-56. *Cf. Dolan*, 512 U.S. at 390 (noting the "intermediate position" of many courts that required a municipality to show a "reasonable relationship" between the required dedication and the impact of the proposed development); *id.* at 391 (adopting that middle level of scrutiny as "the federal constitutional norm" but relabeling it "rough proportionality" to avoid confusion of terms).

Illinois: The Illinois Supreme Court applies a more exacting standard of scrutiny than that required by *Nollan* and *Dolan*. In *Northern Illinois Home Builders Association, Inc. v. County of Du Page*, 649 N.E.2d 384 (Ill. 1995), the Home Builders Association argued that state enabling statutes and county ordinances imposing transportation impact fees on new development "violate the takings clauses of the fifth amendment of the United States Constitution and . . . the Illinois Constitution." *Id.* at 388. The Illinois Supreme Court relied on this Court's takings jurisprudence, including *Nollan* and *Dolan*, to establish the minimum level of protection due under the Takings Clause. *Id.* at 388-89. The court noted the variety of tests applied by courts in other states, and then applied a more exacting standard of scrutiny than is required by *Dolan*—the "specifically and uniquely attributable" standard it had developed earlier in *Pioneer Trust & Savings Bank v. Village of Mount Prospect*, 176 N.E.2d 799, 802 (Ill. 1961). *Northern Illinois Home Builders*, 649 N.E.2d at 389-90. Like *Dolan*, the "specifically and uniquely attributable" test requires that local government demonstrate proportionality—albeit a direct proportionality—between an exaction imposed on new

development and the specifically created need for additional traffic. *Id.* at 389-90. *See Dolan*, 512 U.S. at 389-90.

Oregon: In *Rogers Mach., Inc. v. Washington County*, 45 P.3d 966 (Or. Ct. App. 2002), *cert. denied*, 538 U.S. 906 (2003), a developer challenged the county's ordinance assessing traffic impact fees to fund improvements to city streets and arterials. The court noted that in *Clark v. City of Albany*, 904 P.2d 185 (Or. Ct. App. 1995), *review denied*, 912 P.2d 375 (Or. 1996), it extended *Dolan*'s heightened scrutiny to monetary exactions. *See Rogers Mach.*, 45 P.3d at 979-80 (citing *Clark*, 904 P.2d at 185). The court distinguished the monetary exaction in *Clark* from *Rogers Machinery,* noting that *Clark* dealt with "an ad hoc adjudicatory imposition of a monetary exaction, not a generally applicable and legislatively imposed development fee." *Rogers Mach.*, 45 P.3d at 980. In a later case, the high court of Oregon noted that "the question of under what circumstances the heightened scrutiny imposed by *Dolan* applies to exactions that are monetary in nature is a complex question and is not completely resolved." *Dudek v. Umatilla County*, 69 P.3d 751, 757 (Or. Ct. App. 2003).

2. Other States Only Apply *Nollan* and *Dolan* to Dedications of Land or Fees in Lieu of the Dedication of Land

New York: Like the Washington Supreme Court in *Drebick*, the high court of New York will only apply *Nollan* and *Dolan* to fees that are required in lieu of the dedication of property. In *Twin Lakes Dev. Corp. v. Town of Monroe*, 801 N.E.2d 821 (N.Y. 2003), *cert. denied*, 541 U.S. 974 (2004), a developer challenged the town's "in lieu of parkland" fees arguing that it violated *Dolan*'s rough proportionality test. The developer argued that the ordinance establishing a $1,500 per-lot fee for subdivisions of five or more lots, where parkland dedication would not be appropriate, was not based on an individual assessment of the recreational needs generated by the

subdivision plan and was not roughly proportional to those needs. *See id.* at 824. The court noted that both parties agreed the developer's challenge to the town's per-lot recreation fee was governed by *Dolan*'s rough proportionality test. *See id.* Applying *Dolan*'s rough proportionality analysis to the park fees, the court found that the town's legislative "findings" were sufficient and therefore no taking had occurred. *See id.* at 825. The court, shifting the burden from the town to the developer, found that the developer "failed to demonstrate that the Town's $1,500 per-lot fee constitute[d] a taking." *Id.* at 825.

In a more recent case, the court refused to extend *Nollan* and *Dolan* when the town conditioned approval of a site plan for a single-family home upon the landowner placing a conservation restriction on a portion of the property. *Smith v. Town of Mendon*, 822 N.E.2d 1214 (N.Y. 2004). In *Smith*, the court stated that both *Nollan* and *Dolan* apply only to cases where the government required an actual transfer of property. *Id.* at 1219. Although the court refused to extend *Nollan* and *Dolan* in this case, the court also noted that it did extend *Nollan* and *Dolan*'s standards to a fee imposed in lieu of a physical dedication in *Twin Lakes*. *See id.* ("Outside of these two narrow contexts, neither the Supreme Court nor this Court has classified more modest conditions on development permits as exactions.").

Colorado: In *Krupp v. Breckenridge Sanitation District*, 19 P.3d 687 (Colo. 2001), the Colorado Supreme Court refused to apply *Dolan*'s rough proportionality standard to a sanitation district fee imposed on a residential townhouse project. The court adopted a very narrow interpretation of *Nollan* and *Dolan* that limits application of the nexus and rough proportionality tests to a narrow set of cases involving property exactions and discretionary adjudicative determinations specific to one landowner and one parcel of land. *Id.* at 695-97.

Arizona: The Arizona Supreme Court upheld a water resources fee assessed on new development in *Home Builders Association of Central Arizona v. City of Scottsdale*, 930 P.2d 993 (Ariz.), *cert. denied*, 521 U.S. 1120 (1997). The court said that *Dolan* was not applicable because the reasonableness of the fee was not raised at the trial court, and even if it had been raised, this case is distinguishable from *Dolan.* Tigard demanded an exaction of property from Mrs. Dolan, whereas in this case, Scottsdale sought only a fee. *Id.* at 1000. But then the court noted that the *Dolan* standard of rough proportionality is applicable in Arizona law through the statutory reasonable relationship requirement. *Id.*

Kansas: *McCarthy v. City of Leawood*, 894 P.2d 836 (Kan. 1995), involved a challenge by property owners seeking to invalidate the city's ordinance imposing traffic impact fees. The court, with little explanation, upheld the impact fees and refused to apply *Dolan*'s rough proportionality test. *Id.* at 845. The court noted that *Dolan* involved the dedication of portions of property to the city. *Id.* "There is nothing in [*Dolan*], however, which would apply the same conclusion to Leawood's conditioning certain land uses on payment of a fee." *Id.* A "critical leap" would be required to apply *Dolan* to an exaction in the form of a fee. *Id.*

South Carolina: In *Sea Cabins on the Ocean IV Homeowners Ass'n, Inc. v. City of North Myrtle Beach*, 548 S.E.2d 595 (S.C. 2001), owners of a private fishing pier sued the city for a temporary regulatory taking of the pier. The Supreme Court of South Carolina cited this Court's decision in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999), for the proposition that *Dolan*'s rough proportionality test applies only to physical exactions. 548 S.E.2d at 603 n.5. The South Carolina court noted that, prior to *Del Monte Dunes*, "there was considerable debate as to whether the *Nollan/Dolan* tests applied to more than regulations mandating physical exactions." *Id.* In fact, considerable debate remains today. In

City of Monterey v. Del Monte Dunes at Monterey, Ltd., this Court merely distinguished excessive exactions from the denial of development. *See City of Monterey v. Del Monte Dunes Monterey, Ltd.*, 526 U.S. at 702-03.

Maryland: *Waters Landing Ltd. P'ship v. Montgomery County*, 650 A.2d 712 (Md. 1994). The Montgomery County Council adopted a development impact "fee," which it later changed to a development impact "tax." *Id.* at 714. The developers argued that the tax was actually an assessment, and that the assessment was subject to *Dolan*. *Id.* at 723-24. The court disagreed. The court limited *Dolan* to its facts, explaining that the "development impact tax" at issue in the case was adopted by legislative enactment and did not require landowners to deed portions of their property to the County. *Id.* at 724.

The conflict among the state high courts is real and substantial and involves an important question of federal law. To resolve the conflict, this Court should grant this petition.

II

THE LOWER COURTS ARE SPLIT ON WHETHER *NOLLAN* AND *DOLAN* APPLY WHEN EXACTIONS ARE IMPOSED BY LEGISLATIVE ACTION

In *Trimen Development Co. v. King County*, 877 P.2d 187, 191 (1994), the Washington Supreme Court upheld an exaction in the form of an in lieu of dedication fee assessed pursuant to a King County Council ordinance. The court concluded that "the fees imposed in lieu of dedication were reasonably necessary as a direct result of Trimen's proposed development. *See Dolan v. Tigard* . . . ('rough proportionality' between required dedication and impact of proposed development)." *Id.* at 194 (citations omitted). Now, in *Drebick*, the Washington Supreme Court has concluded that the "rough proportionality"

standard of *Dolan* does not apply to legislatively enacted exactions. App. at A-12.

The Washington Supreme Court's decision in *Drebick* creates a direct conflict with that of the Texas Supreme Court in *Town of Flower Mound v. Stafford Estates Ltd. P'ship*, 135 S.W.3d 620. The facts of the *Town of Flower Mound* are similar to those in *Drebick*. In *Town of Flower Mound*, the town conditioned plat approval on the developer's agreement to construct and pay for improvements for an adjacent public street. *Id.* at 623-24. The developer argued that the exaction should be based on the relationship between the cost of the improvements to the adjacent public street and the impact of the subdivision on that roadway. *Id.* at 624, 626. The Town said that the development's true impact was far broader, and the appropriate exaction is calculated by apportioning the total cost of all roadway improvements among all new developments. *Id. at* 626. The Town also argued that the *Nollan/Dolan* rules do not apply to legislatively imposed exactions; they should only apply to exactions imposed on an ad hoc, individualized basis. *Id.* at 640.

The Texas Supreme Court was not convinced that "a workable distinction can always be drawn between actions denominated adjudicative and legislative" (*id.* at 641) and declined to adopt a bright-line adjudicative/legislative distinction (*id.* at 642). Although, the Texas court refused to expressly decide whether the *Dolan* standard should apply to *all* legislative exactions, it said "we can find no meaningful distinction between the condition imposed on Stafford and the conditions imposed on Dolan and the Nollans. All were based on general authority taking into account individual circumstances." *Id.* at 641.

A. Some Courts Join the Texas Supreme Court in Balancing the Benefits and Burdens of Regulation by Applying the *Nollan/Dolan* Tests to Legislatively Imposed Exactions

Ohio: In *Home Builders Association of Dayton and the Miami Valley v. City of Beavercreek*, 729 N.E.2d at 355-56, the Ohio Supreme Court applied a test based on *Nollan* and *Dolan* to legislatively imposed impact fees to aid in the cost of new roadway projects." *See* section I(1) above for a more detailed description of the case.

Illinois: The Illinois Supreme Court relied on this Court's takings jurisprudence, and applied *Nollan* and *Dolan* to a legislatively imposed transportation impact fee on new development. *Northern Illinois Home Builders Association, Inc. v. County of Du Page*, 649 N.E.2d 387-88. This case is discussed more fully in section I(1) above.

First Circuit Court of Appeals: *City of Portsmouth v. Schlesinger*, 57 F.3d 12 (1st Cir. 1995), involved a challenge to a low-income housing fee imposed when the owner of the site of some low-income apartments sought permission to replace the apartments with new condominiums. *Id.* at 12-13. The developers negotiated with city authorities to obtain a zoning change, and those negotiations resulted in several draft ordinances. *Id.* at 13. The draft ordinance ultimately approved by the city planning board provided for a payment of an impact fee "designed to compensate the City for the impact upon it expected to result from the loss of low income housing." *Id.* at 12-13. The parties negotiated additional impact fees to be paid to the city by the developers in accordance with the terms of a promissory note. *Id.* at 13.

The challenge to the fees was burdened with a statute of limitations issue that dominated the opinion, but the court noted that undisputed facts showed that "no rational nexus existed between the amount of the Developers' . . . [fee] and any

burden imposed on the City due to the zoning change." *Id.* at 14. The court uses the term "rational nexus" as a *Dolan*-style assessment of the relationship between the amount of a fee and the burdens imposed on a municipality by the development. "The district court . . . went on to find factually that no rational nexus existed here as between the $2,500,000 payment sought by the City and any demonstrable burden to be borne by it due to the zoning change." *Id.* at 13.

United States District Court for the Eastern District of Virginia, decision affirmed by the Fourth Circuit Court of Appeals: In *National Association of Home Builders of United States v. Chesterfield County*, 907 F. Supp. 166, 167 (E.D. Va. 1995), *aff'd*, 92 F.3d 1180 (4th Cir. 1996) (unpublished), *cert. denied*, 519 U.S. 1056 (1997), the district court upheld a Chesterfield County Policy adopted to guide the county's acceptance of proffers allowed by an earlier-adopted ordinance. The money from the proffers was to be used to offset the increased cost of specific capital improvements necessitated by proposed residential developments. *Id.* at 168-69. The policy, applicable to all residential rezoning requests, established a method for calculating the maximum proffer that could be tendered with a rezoning application. *Id.* at 168.

The Home Builders asserted that, on its face, the proffer policy "violates the Fifth Amendment to the United States Constitution's prohibition on taking of property without just compensation." *Id.* at 167. The court upheld the policy because

> there is no reason apparent on the face of the Policy why the proffers required, if any, can not [be] determined in an "individualized" manner and fixed at an amount "roughly proportional" in "nature and extent to the impact of the proposed development" according to the test set out in *Dolan v. Tigard.*

Id. at 169.

B. Other Courts Agree with the Washington Supreme Court's Ruling in This Case, and Refuse to Apply *Nollan and Dolan* to Legislatively Imposed Exactions

Georgia: In *Parking Association of Georgia, Inc. v. City of Atlanta*, 450 S.E.2d 200 (Ga. 1994), *cert. denied*, 515 U.S. 1116 (1995), the owners and managers of surface parking lots challenged the constitutionality of an ordinance requiring the addition of barrier curbs, landscaping areas, ground cover, and trees to existing lots in several zoning districts. The court said that plaintiffs' reliance on *Dolan* was misplaced because, unlike Mrs. Dolan, the plaintiffs were not required to deed portions of their property to the city and the required exaction was the result of a legislative determination affecting many landowners. *Id.* at 203.[2]

This Court denied certiorari. But Justices Thomas and O'Connor dissented "[b]ecause the petition poses a substantial federal question concerning regulatory takings and because there is confusion in the lower courts." *Parking Association of Georgia, Inc. v. City of Atlanta*, 515 U.S. at 1118 (Thomas, J., dissenting from denial of certiorari). The dissenting justices expressly questioned the wisdom of treating legislative enactments with special deference.

> It is hardly surprising that some courts have applied *Dollan*'s rough proportionality test even when considering a legislative enactment. It is not clear why the existence of a taking should turn on the type of governmental entity responsible for the

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[2] Three Georgia Supreme Court justices dissented, urging application of a multi-factored "benefit-extraction" analysis based primarily on the *Nollan* "close nexus" and *Dolan* "rough proportionality" tests to determine whether an exaction is an expense that in fairness and justice should be paid for by the public as a whole. 450 S.E.2d at 204.

> taking. A city council can take property just as well as a planning commission can. Moreover, the general applicability of the ordinance should not be relevant in a takings analysis. If Atlanta had seized several hundred homes in order to build a freeway, there would be no doubt that Atlanta had taken property. The distinction between sweeping legislative takings and particularized administrative takings appears to be a distinction without a constitutional difference.

515 U.S. at 1117-18.

California: The California Supreme Court applies the *Nollan* and *Dolan* tests to monetary exactions imposed on an individual and discretionary basis (*Ehrlich v. City of Culver City*, 911 P.2d at 444), but will not apply the same standard to exactions imposed by generally applicable legislation. *See, e.g.*, *San Remo Hotel L.P. v. City and County of San Francisco*, 41 P.3d 87, 102-04 (Cal. 2002), and *Santa Monica Beach, Ltd. v. Superior Court of Los Angeles County*, 968 P.2d 993, 1001-02 (Cal.), *cert. denied*, 526 U.S. 1131 (1999). The court reasons that heightened scrutiny does not apply to exactions in the form of generally applicable development fees, because "the heightened risk of the 'extortionate' use of the police power to exact unconstitutional conditions is not present." *Ehrlich*, 911 P.2d at 444.

Colorado: In *Krupp v. Breckenridge Sanitation District*, 19 P.3d 687, the Colorado Supreme Court refused to apply *Dolan*'s rough proportionality standard to a sanitation district fee generally applicable to all new development within the district. *Id.* at 696. "One critical difference between a legislatively based fee and a specific, discretionary adjudicative determination is that the risk of leveraging or extortion on the part of the government is virtually nonexistent in a fee system." *Id.*

Oregon: In *Rogers Machinery, Inc. v. Washington County*, 45 P.3d at 967, 982, where a business challenged the constitutionality of a traffic impact fee assessed on a development pursuant to a county ordinance, the Oregon Court of Appeals determined that legislatively imposed and calculated development fees are not subject to *Dolan*. The court agreed with the California Supreme Court's contention in *Ehrlich* and *San Remo Hotel* that *Dolan* only applies "with the sort of governmental leveraging that can arise in case-by-case adjudicatory imposition of development conditions." *Id.* at 982. The court does apply *Dolan*'s standard of heightened scrutiny to legislatively authorized dedications of property. *Schultz v. City of Grants Pass*, 884 P.2d 569, 572-73 (Or. Ct. App. 1994). The contradiction between *Schultz* and *Rogers Machinery* was explained as follows: "[W]e appear to have suggested that there were significant discretionary aspects to the land use decision [in *Schultz*]." *Rogers Machinery*, 45 P.3d at 979.

Arizona: The Arizona Supreme Court upheld a water resources fee assessed on new development in *Home Builders Association of Central Arizona v. City of Scottsdale*, 930 P.2d 993. The court said that *Dolan* did not apply to the fee because the fee resulted from "a generally applicable *legislative* decision," which does not involve the same risk of regulatory leveraging that occurs when a landowner must bargain for approval of a particular use of land. *Id.* at 1000.

North Dakota: Burlington Northern Railroad Company challenged a requirement that it modify and maintain drains, bridges, and culverts to accommodate increased water flow resulting from drain improvements made by the Southeast Cass Water Resource District. *Southeast Cass Water Resource District v. Burlington Northern Railroad Company*, 527 N.W.2d 884, 885 (N.D. 1995). The Supreme Court of North Dakota distinguished the facts of *Dolan* by explaining that Burlington Northern's duty "arises not from a municipal 'adjudicative decision to condition,' but rather from an express

and general legislated duty under a constitutional reservation of police power over a corporation." *Id.* at 896.

More than a decade has passed since *Parking Association of Georgia* was decided, and the lower courts remain hopelessly divided on how to interpret the governing precedents and principles when faced with a takings challenge to legislatively imposed exactions. As noted in a 2003 decision of the Georgia Supreme Court, "no consensus has emerged in other courts on the issue of *Dolan*'s application to legislative determinations." *Greater Atlanta Homebuilders Association v. DeKalb County*, 588 S.E.2d 694, 701 (Ga. 2003) (Carley, J., dissenting). Only this Court can resolve the conflict in the state and lower federal courts.

III

WHETHER CONSTITUTIONAL TAKINGS STANDARDS APPLY BROADLY IN THE CONTEXT OF DEVELOPMENT EXACTIONS PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW

A. Excluding Fees and Legislatively Imposed Exactions from the Scrutiny of *Nollan* and *Dolan* Does Not Further the Purpose of the Takings Clause

The choice of lower courts to apply different constitutional tests based on the form of an exaction and whether it is imposed by legislative enactment or quasi-adjudicative administrative decision ignores the policy problems *Nollan* and *Dolan* were intended to resolve. The close nexus and rough proportionality tests formulated by those cases seek to prevent coercive and unfair government behavior when a property owner must obtain government's permission to use property in a particular way.

In *Armstrong v. United States*, 364 U.S. 40, 49 (1960), this Court explained that "[t]he Fifth Amendment's guarantee that

private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." The requirements of a nexus and rough proportionality provide a means to ensure that the purpose of the Fifth Amendment is fulfilled. *See, e.g.*, *Manocherian v. Lenox Hill Hospital*, 643 N.E.2d 479 (N.Y. Ct. App. 1994), *cert denied*, 514 U.S. 1109 (1995) (The New York Court of Appeals noted that a rent stabilization ordinance transferred significant, distinctive, apartment ownership prerogatives to Lenox Hill Hospital without its having to endure the burdens and costs of ownership. *Id.* at 481. The court concluded that the ordinance failed the constitutional test because it created an "indeterminate and unjustifiable burden draped disproportionately on the particular owners' shoulders." *Id.* at 483.). *See also* James L. Huffman, *Colloquium on* Dolan: *The Takings Clause Doctrine of the Supreme Court and the Federal Circuit:* Dolan v. City of Tigard: *Another Step in the Right Direction*, 25 Envtl. L. 143, 150 (1995) ("The takings clause . . . protects against this majoritarian tyranny . . . by insisting that the costs imposed by government use or regulation of private property are borne by all to whom the benefits inure." *Id.* at 152.).

The use of arbitrary distinctions to apply a less exacting standard of review to fees and to legislatively imposed exactions can result in exactions unrelated to the impact of development, as demonstrated in this case. Indeed, local governments will prefer to utilize their legislative power to impose exactions if such exactions are not subject to the same exacting standard as applies to adjudicative exactions.

Legislatively imposed exactions have become an increasingly popular method of funding local projects. *See* Carlos A. Ball & Laurie Reynolds, *Exactions and Burden Distribution in Takings Law*, 47 Wm. & Mary L. Rev. 1513

(2006) (The authors discussing the marked shift in local government financing from general revenue taxes to "nontax revenue-raising devices such as exactions." *Id.* at 1513. The authors argue in favor of extending the *Nollan/Dolan* standards to all local government exactions, "replacing the currently relevant distinctions between legislative and adjudicative exactions, and between land and monetary exactions." *Id.* at 1519.); Ronald H. Rosenberg, *The Changing Culture of American Land Use Regulation: Paying for Growth With Impact Fees*, 59 SMU L. Rev. 177, 256-57 (2006) (noting the increasing use of development impact fees, and the split regarding application of *Dolan*'s rough proportionality test to fees as opposed to possessory exactions).

The Takings Clause's substantive protection of private property rights is undermined by artificial distinctions between exactions: monetary impact fees and other monetary and nonmonetary exactions, and exactions imposed by legislative acts and those imposed by quasi-adjudicative acts.

B. The Risk of Government Extortion Is Heightened When Exactions Are Imposed Legislatively

In *Ehrlich*, the California Supreme Court opined that heightened scrutiny is not required when analyzing the constitutionality of legislatively formulated exactions, because "the heightened risk of the 'extortionate' use of the police power to exact unconstitutional conditions is not present." *Ehrlich*, 911 P.2d at 444. Other state courts followed suit. *See, e.g.*, *Rogers Machinery, Inc. v. Washington County*, 45 P.3d at 982; *Krupp v. Breckenridge Sanitation District*, 19 P.3d at 696; and *Home Builders Association of Central Arizona v. City of Scottsdale*, 930 P.2d at 1000.

The fact is that the risk of government extortion does not disappear when exactions are imposed by legislation of general applicability. *See* Inna Reznik, *The Distinction Between*

Legislative and Adjudicative Decisions in Dolan v. City of Tigard, 75 N.Y.U. L. Rev. 242, 251(2000) ("The extortion and inequitable economic burdens that local governments potentially impose on landowners through administrative processes can occur just as easily in the legislative context." *Id.* at 267.). Indeed, it is highly probable that grossly disproportionate exactions will result from broadly applicable, generalized exaction programs. Local legislative bodies acting in their legislative capacity may be more likely to use the police power to exact unconstitutional conditions than in the adjudicative setting. *See* Reznik, *supra*, at 270-72.

Parties to adjudicative proceedings have significant procedural rights that may enhance equal treatment for competing interests. Reznik, *supra*, at 273. But the only safeguard against legislatively imposed extortionate exactions is found in the political process. The California Supreme Court noted that

> [w]hile legislatively mandated fees do present some danger of improper leveraging, such generally applicable legislation is subject to the ordinary restraints of the democratic political process. A city council that charged extortionate fees for all property development, unjustifiable by mitigation needs, would likely face widespread and well-financed opposition at the next election.

San Remo Hotel L.P. v. City and County of San Francisco, 41 P.3d at 105. *See Rogers Machinery v. Washington County*, 45 P.3d at 982, (citing with approval the quoted language).

While the democratic political process may protect against extortionate fees for all property development, it is doubtful that the political process would work as efficiently to remove government officials who impose extortionate fees on only some forms of property development. The cost of development exactions is invisible to the majority of voters, and developers

are subject to the kind of majoritarian oppression that effects seriously outnumbered groups. *See Town of Flower Mound v. Stafford Estates Ltd. P'ship*, 135 S.W.3d at 641 ("[W]e think it entirely possible that the government could 'gang up' on particular groups to force extractions that a majority of constituents would not only tolerate but applaud, so long as burdens they would otherwise bear were shifted to others."). *See* Reznik, *supra*, at 271-72; and William A. Fischel, *Utilitarian Balancing and Formalism in Takings*, 88 Colum. L. Rev. 1581, 1582 (1988).

C. A Takings Determination Based on the Nature of Government Action Does Not Afford Protection for Important Individual Rights

The Fifth Amendment itself does not distinguish between kinds of property that may be taken or the manner by which property is taken. U.S. Const. amend. V. Indeed, there is "little doctrinal basis beyond blind deference to legislative decisions to limit [the] application [of *Dolan*] only to administrative or quasi-judicial acts of government regulators." David L. Callies, *Regulatory Takings and the Supreme Court: How Perspectives on Property Rights Have Changed from* Penn Central *to* Dolan, *and What State and Federal Courts Are Doing About It*, 28 Stetson L. Rev. 523, 567-68 (1999); *See* D.S. Pensley, *Real Cities, Ideal Cities: Proposing a Test of Intrinsic Fairness for Contested Development Exactions*, 91 Cornell L. Rev. 699, 704 (2006) ("[T]here is . . . no principled basis for giving greater deference to exactions imposed through legislative enactment than to those imposed through adjudication.").

Some courts and legal scholars conclude that *Nollan* and *Dolan* show this Court's intent to set out principles for all property and land use regulation matters. *See, e.g.*, *Manocherian v. Lenox Hill Hospital*, 643 N.E.2d at 483, ("[T]he Supreme Court refrained from placing any limitations

or distinctions or classifications on the application of the 'essential nexus' test."); and Callies, *supra*, at 567 (The *Nollan* and *Dolan* decisions involved property dedications, but the nexus and proportionality rules are of more universal application.).

Significantly, both *Nollan* and *Dolan* involved a mixture of legislative and adjudicative government action.[3] In *Nollan*, this Court, responding to Justice Brennan's dissent, noted the Coastal Commission's "public announcement of its intention to condition the rebuilding of houses on the transfer of easements." 483 U.S. at 833 n.2. In other words, just as in the present case, the Coastal Commission's statewide exaction policy was applied on a uniform and consistent basis. The statutory requirement in *Dolan* that landowners contribute to transportation infrastructure was also generally applicable and was adopted through legislative action. *Dolan*, 512 U.S. at 378 (noting that the community development code "requires that new development facilitate this plan by dedicating land for pedestrian pathways").

The lower courts that adopt artificial distinctions between exactions create a roadmap for local governments to avoid constitutional takings standards: so long as local governments impose exactions in the form of fees and impose them by legislative acts, *Nollan* and *Dolan* do not apply. The vast majority of development exactions then are free from constitutional scrutiny, and property owners are deprived of important constitutional liberties. Takings law is turned on its head when, instead of looking at the effect of regulation on a property owner, the manner of government action dictates whether there is a taking.

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[3] The blending of legislative, administrative, and judicial functions is common in land use decisionmaking. *See* Reznik, *supra*, at 257-66.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

DATED: August, 2006.

Respectfully submitted,

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Appendix A–1

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

CITY OF OLYMPIA, a Washington code city,	)	No. 75270-2
	)	En Banc
Petitioner,	)	
v.	)	Filed JAN 19 2006
JOHN DREBICK and JANE DOE DREBICK, husband and wife, d.b.a. DREBICK INVESTMENTS,	)	
Respondents.	)	

OWENS, J.—The City of Olympia (the City) seeks reversal of a Court of Appeals decision that invalidated the City's calculation of a transportation impact fee imposed on a commercial developer, Drebick Investments (Drebick). At issue is whether the City's impact fee ordinances comply with the impact fee statutes, RCW 82.02.050-.090, of the Growth Management Act (GMA), chapter 36.70A RCW. We hold that, contrary to the city hearing examiner's interpretation, the GMA impact fee statutes do not require local governments to calculate an impact fee by making individualized assessments of the new development's direct impact on each improvement planned in a service area. We reverse the decision of the Court of Appeals.

FACTS

In July 1998, Drebick sought approval from the City for construction of a four-story, 54,000-square-foot office building within the city limits. The City approved the proposal, subject to Drebick's payment of a transportation impact fee of $132,328.98, calculated according to the City's legislatively adopted fee schedule. *See* former Olympia Municipal Code (OMC) 15.06, 15.10, 15.14, 15.18 (1999). In February 1999, Drebick sought a fee adjustment by submitting an independent fee calculation, as permitted in former OMC 15.10.020, but two months later the City's director of community planning and development rejected Drebick's alternative calculations, concluding that they did not meet the requisite accuracy and reliability criteria of former OMC 15.10.020D.

Drebick appealed the director's decision to the city hearing examiner, and hearings were held on four days in May and June 2000. In November 2000, the hearing examiner reversed the City, and the City sought review in Thurston County Superior Court under the Land Use Petition Act (LUPA), chapter 36.70C RCW. The superior court reversed the hearing examiner's decision, and we then denied Drebick's request for direct review in this court. The Court of Appeals thereafter reversed the superior court and remanded the matter to the City for a recalculation of the impact fee. *City of Olympia v. Drebick*, 119 Wash.App. 774, 83 P.3d 443 (2004). We granted the City's petition for review.

ISSUE

In calculating the transportation impact fees imposed on the Drebick development, did the City comply with the statutory standards set forth in RCW 82.02.050-.090 for apportioning such fees?

ANALYSIS

Standard of Review. At issue are the hearing examiner's interpretation of the impact fee statutes, RCW 82.02.050-.090, and his conclusion of law that, in calculating the impact fees imposed on Drebick, the City failed to comply with the requirements of RCW 82.02.050(3).[1] In its LUPA petition, the City asserted that the hearing examiner's decision was "based on erroneous interpretations of law." Clerk's Papers (CP) at 10-11; *see* RCW 36.70C.130(1)(b) (providing relief where party establishes that "land use decision is an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise"). This court reviews issues of statutory interpretation and claimed errors of law de novo. *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wash.2d 1, 9, 43 P.3d 4 (2002); *Pinecrest Homeowners Ass'n v. Glen A. Cloninger & Assocs.*, 151 Wash.2d 279, 290, 87 P.3d 1176 (2004).

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[1] Relying on *New Castle Investments v. City of LaCenter*, 98 Wash.App. 224, 989 P.2d 569 (1999), *review denied*, 140 Wash.2d 1019, 5 P.3d 9 (2000), the hearing examiner determined that the "impact fees must be deemed taxes," but he concluded that, even so, they "must still meet the relationship, proportionality and benefit requirements of RCW 82.02.050 et seq." Clerk's Papers (CP) at 42. Similarly, the Court of Appeals described "the [tax-fee] distinction" as "immaterial": "Given that RCW 82.02.020 bars *either* a tax *or* a fee '[e]xcept as provided in RCW 82.02.050 through 82.02.090,' the question here is not whether the City assessed a tax or fee, but whether the City complied with RCW 82.02.050 through RCW 82.02.090." *Drebick*, 119 Wash.App. at 778-79, 83 P.3d 443 (citing *New Castle*, 98 Wash.App. at 234, 236, 989 P.2d 569 (concluding that impact fees "resemble taxes" but declining to "hold that these fees are taxes")). We agree that merely labeling the GMA impact fees either taxes or regulatory fees will not be dispositive here. Our task is to interpret the relational standard prescribed in RCW 82.02.050(3) and to determine whether the City complied with that standard.

Principles of Statutory Interpretation. The aim of statutory interpretation is "to discern and implement the intent of the legislature." *State v. J.P.*, 149 Wash.2d 444, 450, 69 P.3d 318 (2003); *Campbell & Gwinn*, 146 Wash.2d at 9, 43 P.3d 4. A reviewing "court is required, whenever possible, to give effect to every word in a statute." *Dennis v. Dep't of Labor & Indus.*, 109 Wash.2d 467, 479, 745 P.2d 1295 (1987). Where the meaning of a provision is "plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent." *Campbell & Gwinn*, 146 Wash.2d at 9-10, 43 P.3d 4. A provision's plain meaning may be ascertained by an "examination of the statute in which the provision at issue is found, as well as related statutes or other provisions of the same act in which the provision is found." *Id.* at 10, 43 P.3d 4 (citing, inter alia, *C.J.C. v. Corp. of the Catholic Bishop of Yakima*, 138 Wash.2d 699, 708-09, 985 P.2d 262 (1999) (stating that "[r]elated statutory provisions are interpreted in relation to each other and all provisions harmonized")); *see also State v. Clausing*, 147 Wash.2d 620, 630, 56 P.3d 550 (2002) (Owens, J., dissenting) (noting that "[a]pplication of the statutory definitions to the terms of art in a statute is essential to discerning the plain meaning of the statute"). Only when the plain, unambiguous meaning cannot be derived through such an inquiry will it be "appropriate [for a reviewing court] to resort to aids to construction, including legislative history." *Campbell & Gwinn*, 146 Wash.2d at 12, 43 P.3d 4.

Impact Fees under the GMA. In 1990, the legislature enacted RCW 82.02.050-.090 as part of the GMA, authorizing local governments to condition the approval of development proposals on the payment of "impact fees" to defray a portion of the costs arising from "new growth and development." RCW 82.02.050(1)(a). The legislature expressly stated that its "intent" is "[t]o ensure . . . adequate facilities . . . to serve new growth and development; . . . [t]o promote orderly growth and development by establishing standards by which [local

governments] may require, by ordinance, that new growth and development pay a proportionate share of the cost of the new facilities needed to serve new growth and development; and . . . [t]o ensure that impact fees are imposed through established procedures and criteria so that specific developments do not pay arbitrary fees or duplicative fees for the same impact." *Id.* subsection (1)(a)-(c). Thus, by enacting the impact fee statutes, the legislature intended to enable towns, cities, and counties to plan for "new growth and development" and to recoup from developers a predictable share of the infrastructure costs attributable to the planned growth, with the qualification that the local government's "procedures and criteria" were to protect "specific developments" from impact fees that were "arbitrary" or that "duplicat[ed]" the amount paid for "the same impact."

Just as RCW 82.02.050(1)(a)-(c) distinguishes "specific developments" from, in general, "new growth and development," subsection (2) authorizes local governments to impose impact fees on particular "development activity" as a means of financing the "system improvements" planned to accommodate overall "new development" in a defined service area:

> Counties, cities, and towns that are required or choose to plan under RCW 36.70A.040 are authorized to impose impact fees on *development activity* as part of the financing for public facilities, provided that the financing for system improvements to serve *new development* must provide for a balance between impact fees and other sources of public funds and cannot rely solely on impact fees.

(Emphasis added.) The definition in RCW 82.02.090(1) leaves no doubt that "[d]evelopment activity" refers to the particular new development seeking approval: "'Development activity' means any construction or expansion of a building, structure, or use, any change in use of a building or structure, or any changes

in the use of land, that creates additional demand and need for public facilities." RCW 82.02.050(2) therefore authorizes local governments, planning under the GMA, to impose impact fees on individual developments to cover the increased demand for roads, parks, schools, or fire stations identified in the capital facilities plan for a designated service area.[2]

The legislature provided two overlapping definitions of "impact fees." First, setting forth three limitations on such fees, RCW 82.02.050(3) mandates that they

> (a) Shall only be imposed for system improvements that are reasonably related to *the new development;*
>
> (b) Shall not exceed a proportionate share of the costs of system improvements that are reasonably related to *the new development;* and
>
> (c) Shall be used for system improvements that will reasonably benefit *the new development.*

(Emphasis added.) Compressing (a)-(c), RCW 82.02.050(3) explains that impact fees "[s]hall only be imposed for [a proportionate share of the costs of] system improvements that are reasonably related to [and reasonably beneficial to] the new development." That, here, the statute speaks of "*the* new development," (emphasis added) as opposed to "new growth and development" or "new development" (as in the preceding

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[2] The term "[s]ystem improvements" denotes those "public facilities that are included in the capital facilities plan and are designed to provide service *to service areas within the community at large,* in contrast to project improvements." RCW 82.02.090(9) (emphasis added); *see* RCW 82.02.090(6) (defining "[p]roject improvements" as "site improvements . . . planned and designed to provide service for a particular development project"); RCW 82.02.090(7) (defining "[p]ublic facilities" as, generally, roads, parks, schools, and fire stations).

section .050(1) and (2)), indicates that "*the* new development" is synonymous with the "development activity"—that is, with *the particular* new development seeking approval. *See Cowiche Growers, Inc. v. Bates*, 10 Wash.2d 585, 618, 117 P.2d 624 (1941) (Simpson, J., dissenting) (noting that the use of the definite article has a "'specifying or particularizing effect'" (quoting 1 WORDS AND PHRASES 1 (perm.ed., n.d.))); *Dennis*, 109 Wash.2d at 479, 745 P.2d 1295 (requiring courts "to give effect to every word in a statute").

The definition of impact fees in RCW 82.02.090(3) echoes the criteria set forth in 82.02.050(3)(a)-(c) and establishes that the phrase "the new development" means the individual development seeking approval: "'Impact fee' means a payment of money imposed upon development as a condition of development approval to pay for public facilities needed to serve new growth and development, and that is reasonably related to *the new development that creates additional demand and need for public facilities,* that is a proportionate share of the cost of the public facilities, and that is used for facilities that reasonably benefit *the new development.*" (Emphasis added.) Requiring that the impact fee be "reasonably related to the new development that creates additional demand and need for public facilities," the RCW 82.02.090(3) definition grafts onto "the new development" the definition of "development activity" (a term indisputably denoting the particular development); the legislature thus identified "the new development" as the individual development seeking approval. Moreover, the refund provision plainly equates the beneficiary of the system improvements with the particular new development seeking approval; RCW 82.02.080(1) refers to the local government's six-year window for spending the impact fees "on public facilities *intended to benefit the development activity for which the impact fees were paid.*" (Emphasis added.) In sum, we conclude that, in RCW 82.02.050(3) and 82.02.090(3), the legislature unambiguously provided that the impact fees were

to be a "proportionate share" of the costs of "system improvements" (that is, roads, parks, schools, or fire stations identified in the capital facilities plan) that are "reasonably related to" and "reasonably benefit" the particular development seeking approval.[3]

The question, then, is what the legislature intended when it required that the facilities funded by impact fees be *reasonably related and beneficial to* the particular development seeking approval. To discern the legislature's intended meaning, we must turn, in the first instance, to "related statutes or other provisions of the same act." *Campbell & Gwinn*, 146 Wash.2d at 10, 43 P.3d 4. The legislature declared at the outset its aim of "establishing standards" by which local governments could impose impact fees. RCW 82.02.050(1)(b). Those standards, most of which are spelled out in RCW 82.02.060, presumably enable local governments to arrive at fees that satisfy the criteria of RCW 82.02.050(3). The primary standard prescribed by the legislature is the local government's creation of a fee schedule: "The local ordinance by which impact fees

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[3] In contrast to this analysis, the Court of Appeals decision rests on the unpersuasive view that RCW 82.02.050(3) is "ambiguous in at least two ways." 119 Wash.App. at 780, 83 P.3d 443. The Court of Appeals contended that the phrase "the new development" referred ambiguously to all new developments or to the particular development seeking approval. *Id.* The court necessarily found a second instance of ambiguity in whether the impact fees had to be "reasonably related to" "the cumulative impacts of all new development activity" or to "the individualized impacts of the permittee's specific project." *Id.* Only by declaring RCW 82.02.050(3) ambiguous was the court able to embark sua sponte on a lengthy examination of legislative history, *id.* at 781-86, 83 P.3d 443, and to conclude with an application of two canons of statutory construction. *Id.* at 786-90, 83 P.3d 443; *see Campbell & Gwinn*, 146 Wash.2d at 11-12, 43 P.3d 4 (noting that recourse to legislative history is appropriate only where intended meaning is indiscernible from plain language of provision and related provisions and statutes).

are imposed . . . [s]hall include *a schedule of impact fees . . . for each type of development activity* that is subject to impact fees, *specifying the amount of the impact fee* to be imposed *for each type of system improvement.* The schedule shall be based upon *a formula or other method* of calculating such impact fees." RCW 82.02.060(1) (emphasis added). The legislature further prescribed that the local government's impact fee ordinance "[s]hall establish one or more *reasonable* service areas within which it shall calculate and impose impact fees for *various land use categories per unit of development.*" RCW 82.02.060(6) (emphasis added). The legislature thus indicated that a reasonable relationship would be achieved between the funded improvements and the individual development if the local government defined a reasonable service area, identified the public facilities therein that would require improvement over a span of six years, and prepared a fee schedule taking into account the type and size of the development seeking approval as well as the type of public facility being funded.

Other provisions in the GMA impact fee statutes support the conclusion that the legislature authorized local governments to calculate the fees by tying the particular development to the service area's improvements *as a whole,* not to *particular* system improvements within the service area. First, RCW 82.02.060(4) and (5) provide that the local government's impact fee ordinance must "allow the county, city, or town . . . to adjust the standard impact fee . . . to consider unusual circumstances in specific cases" and to consider "studies and data submitted by the developer." These provisions, in conjunction with the requirements of the fee schedule, serve the legislature's aim of "ensur[ing] that impact fees are imposed through established procedures and criteria so that specific developments do not pay arbitrary fees or duplicative fees for the same impact." RCW 82.02.050(1)(c). Just as the very existence of section .060(4) and (5) underscores that a particular development's impact fee is the product of a predetermined schedule for the service area,

the distinction between "system improvements" and "project improvements" likewise makes it clear that a particular development's impact fee is computed with reference to all improvements in the service area, not simply with regard to those individual projects that the particular development directly affects. *See supra* note 2.

By requiring a general fee schedule for planned, systemwide improvements and allowing individualized fee calculations as an exception, the legislature distinguished the impact fee statutes from the regulatory fees referred to in RCW 82.02.020:

> Except as provided in RCW 82.02.050 through 82.02.090, no county, city, town, or other municipal corporation shall impose any tax, fee, or charge, either direct or indirect, on the construction or reconstruction of residential buildings, commercial buildings, industrial buildings, or on any other building or building space or appurtenance thereto, or on the development, subdivision, classification, or reclassification of land. However, this section does not preclude dedications of land . . . within the proposed development . . . which the county, city, town, or other municipal corporation can demonstrate are reasonably necessary as a *direct* result of the proposed development . . . .
>
> This section does not prohibit voluntary agreements with counties, cities, towns, or other municipal corporations that allow a payment in lieu of a dedication of land or to mitigate a *direct* impact that has been identified as a consequence of a proposed development. . . .

(Emphasis added.) GMA impact fees are likewise distinct from those exacted under the State Environmental Policy Act (SEPA), chapter 43.21C RCW, which authorizes

local jurisdictions to impose conditions on a proposed development "to mitigate *specific* adverse environmental impacts." RCW 43.21C.060 (emphasis added). Similarly, the local transportation act (LTA), chapter 39.92 RCW, limits the fee to "the amount that the local government can demonstrate is reasonably necessary as a *direct* result of the proposed development." RCW 39.92.030(4) (emphasis added). Notably, in the GMA impact fee statutes, the legislature did *not* require that the funded facilities be *directly* or *specifically* related and beneficial to the development seeking approval. Whereas the starting point in the calculation of SEPA or LTA fees is the individual development and its direct impact, the local government's calculation of a proposed development's GMA impact fee begins, in contrast, with the anticipation of the area-wide improvements needed to serve new growth and development in the aggregate.

Ignoring the distinction between impact fees under RCW 82.02.050-.090 and land dedications under RCW 82.02.020, the dissent takes the contrary view that local governments must base GMA impact fees on individualized assessments of the direct impacts each new development will have on each improvement planned in a service area. To advance this claim, the dissent resorts to inapposite legislative history. *See supra* note 3. According to the dissent, "[t]he legislative history, well documented by the Court of Appeals, *conclusively demonstrates* "the legislature's intent that "the *Nollan/Dolan* standard"—drawn from two Fifth Amendment physical takings cases, the latter postdating the GMA—"be applied with regard to RCW 82.02.050(3)(a)-(c)." Dissent at 14-15 & n.11 (emphasis added) (citing *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987); *Dolan v. City of Tigard*, 512 U.S. 374, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994)). The dissent does not explain that neither *Nollan* nor *Dolan* concerned the imposition of impact fees but addressed instead the authority of a local government to condition

development approval on a property owner's dedication of a portion of land for public use; nor does the dissent mention that neither the United States Supreme Court nor this court has determined that the tests applied in *Nollan* and *Dolan* to evaluate land exactions must be extended to the consideration of fees imposed to mitigate the direct impacts of a new development, much less to the consideration of more general growth impact fees imposed pursuant to statutorily authorized local ordinances. *See City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 702-03, 119 S.Ct. 1624, 143 L.Ed.2d 882 (1999) (noting that the Court has "not extended the rough-proportionality test of *Dolan* beyond the special context of exactions-land-use decisions conditioning approval of development on the dedication of property to public use"). For the proposition that the *Nollan-Dolan* standard should apply to GMA impact fees, the dissent inaptly cites decisions from other jurisdictions applying that standard to *direct* mitigation fees of the type referred to in RCW 82.02.020 (that is, to fees in lieu of possessory exactions), not to the legislatively prescribed development fees at issue here.[4]

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[4] For example, the dissent relies on *Ehrlich v. City of Culver City*, 12 Cal.4th 854, 50 Cal.Rptr.2d 242, 911 P.2d 429, 444, *cert. denied*, 519 U.S. 929, 117 S.Ct. 299, 136 L.Ed.2d 218 (1996). There, the owner of a tennis and fitness club sought approval to replace the facility with a condominium development. To address the loss of the recreational space, the city, in response to the developer's offer to build four new tennis courts, conditioned project approval on a payment of $280,000 in lieu of the four courts. The California State Supreme Court concluded that the *Nollan-Dolan* standard applicable to land exactions for direct impacts should also apply to fees imposed in lieu of such exactions for direct impacts. *Id.* at 447. Significantly, the *Ehrlich* court observed that "it is not at all clear that the rationale (and the heightened standard of scrutiny) of *Nollan* and *Dolan* applies to cases in which the exaction takes the form of a *generally* applicable development fee or assessment—cases in which

(continued...)

Nevertheless, despite the absence of any link between the *Nollan-Dolan* standard and the impact fees authorized in RCW 82.02.050-.090, the dissent identifies, as "the most important conclusion to be drawn from the legislative history," "the legislature's deliberate use of the *identical* terms [used by the *Nollan* Court] to describe the 'nexus' requirement of the Fifth Amendment: 'reasonably related to.'" Dissent at 15 (citing *Drebick*, 119 Wash.App. at 785, 83 P.3d 443 (quoting *Nollan*, 483 U.S. at 838, 107 S.Ct. 3141)). First, to be clear, the Court of Appeals pointed to *nothing* in the legislative history that referred to the *Nollan* test, much less anything revealing that legislators had considered and deliberately applied language drawn from *Nollan.* Second, given that the legislature has used the phrase "reasonably related to" in literally dozens of statutes, its use of the phrase in the impact fee statutes could not be less remarkable; certainly, the presence of this commonplace standard does not, as the dissent claims, "conclusively demonstrate[ ]" the legislature's "deliberate use" of the *Nollan* standard.[5] Finally, we find equally flawed the dissent's claim that "the definition of 'proportionate share' in RCW 82.02.090(5) supports the conclusion that the legislature intended the *Nollan* definition of 'reasonably related.'" Dissent at 18. The dissent states that the "definition clearly defines the amount of impact fees that can be charged in relation to the specific proposed development," but here the dissent rewrites the provision, which refers to "*the service demands and needs of new development*"—not "*the* new development," as the

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[4] (...continued)
the courts have deferred to legislative and political processes to formulate 'public program[s] adjusting the benefits and burdens of economic life to promote the common good.'" *Id.* (quoting *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978)).

[5] Notably, the hearing examiner did not import the *Nollan-Dolan* standard into his analysis of the statutory standards. CP at 42.

dissent interprets it. *Id.* (second emphasis added). In sum, legislative history provides no support for the dissent's claim that, by using the term "reasonably related to," the legislature manifested its intention to require local governments to calculate GMA impact fees by making individualized assessments of each proposed development's direct impact on each improvement planned in a service area.

The City's Calculation of Transportation Impact Fees. Exercising the authority granted in RCW 82.02.050(2) and adhering to the requirements of RCW 82.02.060, the City adopted its transportation impact fee ordinances, codified in former OMC 15.06, 15.10, 15.14, and 15.18. As permitted in RCW 82.02.060(6), the City "elected to base its fee structure on a single service area coterminous with its Urban Growth Area." Admin. R. at 6. Having reviewed the City's method of calculating transportation impact fees, the hearing examiner summarized the City's method as follows:

> (a) Project the cost of the transportation improvement projects in the UGA needed to provide capacity for new growth over the six-year period from 1994 to 2000. This estimate does not include the cost of improvements to address existing deficiencies and has been reduced to account for the percentage of pass-through traffic and funds expected from grants and various other sources.
>
> (b) Project the total number of new, afternoon peak-hour trips with at least one end in the UGA during the same six-year period.
>
> (c) Divide the projected cost from (a) by the projected number of trips in (b) for the average cost of a new trip in the UGA over the six-year period.
>
> (d) Convert this average cost into impact fees for specific types and sizes of development by

> considering the number of vehicle trips entering or leaving the land use at issue during the afternoon peak hour, the varying trip lengths generated by different land uses, and the percentage of "pass-by" trips.

CP at 21. In former OMC 15.18.010, the City set forth the resulting fee schedule, as required in RCW 82.02.060(1). In compliance with RCW 82.02.060(4) and (5), former OMC 15.10.020 allowed individual developers to request departures from the fee schedule and permitted the City to consider independent fee calculations on a case-by-case basis.[6]

The hearing examiner then made the following findings regarding the City's legislatively adopted fee schedule:

> 34. Under the method used by Olympia to calculate transportation impact fees, the impact fee assessed a specific development *is proportionate to and reasonably related to the jurisdiction-wide need for new transportation improvements created by that development.*
>
> 35. Every land use benefits in a general sense from a smoothly functioning transportation system with adequate capacity *in the jurisdiction in which it is located.* Under Olympia's method the transportation impact fee assessed a specific development *is used for improvements that will reasonably benefit that development, if benefit is*

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[6] "Independent fee calculations have been granted by the City in the past where it was shown that the development in question did not generate projected peak hour traffic flows or that the traffic, if generated, primarily utilized transportation facilities in other cities. Cited examples were an apartment complex for the aged, a boat repair workshop, and a hotel on the edge of the City." CP at 7.

> *judged by the effect of the transportation improvements in the jurisdiction as a whole.*

CP at 22 (emphasis added). Paraphrasing his findings, the hearing examiner repeated that "the Drebick fee is proportionate to and reasonably related to the demand for new capacity improvements *considered as a whole*" and that "those improvements *considered as a whole* will benefit the Drebick development." *Id.* at 32 (emphasis added). The hearing examiner's reference to "the jurisdiction-wide need for new transportation improvements," "the transportation improvements in the jurisdiction as a whole," and "improvements considered as a whole" is consistent with the statute's definition of "system improvements" as those "public facilities . . . designed to provide service to service areas within the community at large, in contrast to project improvements." RCW 82.02.090(9). The City permissibly defined its "service area" as the City's urban growth area, a fact that explains the hearing examiner's use of the words "jurisdiction-wide" and "jurisdiction." The hearing examiner thus found that the City's method for calculating transportation impact fees met the statutory requirement that "system improvements" be "reasonably related to" and "reasonably benefit" the specific development. RCW 82.02.050(3)(a)-(c), .090(9).

The dissent takes issue with the City's designation of a single service area. However, RCW 82.02.060(6) mandates that a local government's impact fee ordinance must "establish *one* or more reasonable service areas." (Emphasis added.) Moreover, nowhere in the hearing examiner's findings and conclusions was the City's compliance with RCW 82.02.060(6) questioned. *See* CP at 13-48. Indeed, in the only finding touching on the reasonableness of the City's designation of a single service area, the hearing examiner stated that the City's traffic consultant had found "the use of a jurisdiction-wide average cost as the basis for the impact fee rates . . . justified, because *the City's relatively compact geography* matched

closely with the average trip lengths, such that in most cases an average trip would traverse a good portion of the City boundaries." *Id.* at 22 (emphasis added). Nevertheless, proceeding as though the reasonableness of the service area were an issue before this court, the dissent attacks the City's designation and, in a hallucinatory sequence, actually likens Olympia to the San Juan Islands. *See* dissent at 12-13. The dissent disregards the qualification in RCW 82.02.090(8) that "[s]ervice areas *shall be designated on the basis of sound planning or engineering principles.*" (Emphasis added.) Were we called upon to review a city's compliance with that statutory requirement, we would doubtless rely on evidence previously provided by city planners, engineers, and other experts, not on the deployment of our own strained hypotheticals. We also note that, while the definition of "[s]ervice area" requires that the "public facilities" within the designated area "provide service to development within the area," that requirement simply does not mean, as the dissent contends, that for a service area to be reasonable each public facility in the service area must directly serve each new development project. RCW 82.02.090(8). The dissent's contention rests on the insupportable notion that "development within the area" does not mean area-wide development but means instead *the particular new* "development" *project seeking approval* "within the area." In the dissent's view, the only "reasonable" service area would be one no larger than the project site for the new development seeking approval, but the statutory scheme clearly distinguishes between project sites and service areas.[7]

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[7] *See supra* note 2 (distinguishing "project improvements" and "system improvements"). The dissent's reliance on *Trimen Development Co. v. King County*, 124 Wash.2d 261, 877 P.2d 187 (1994), underscores the dissent's mistaken belief that GMA impact fees are indistinguishable from the direct mitigation fees of RCW 82.02.020. Dissent at 11-12. Even though the fees at issue in *Trimen*

(continued...)

The hearing examiner's inquiry should have ended with his factual findings that "the Drebick fee is proportionate to and reasonably related to the demand for new capacity improvements *considered as a whole*" and that "those improvements *considered as a whole* will benefit the Drebick development." CP at 32 (emphasis added). However, the hearing examiner went on to hold that the City's calculations violated RCW 82.02.050(3) because Drebick's impact fee was not "reasonably related to the service demands or needs created by the Drebick proposal on *each* of the individual project groups on which the impact fees [were] based." CP at 22 (emphasis added); *see supra* note 6. But as discussed above, nothing in the plain language of the GMA impact fee statutes supports the hearing examiner's view that the City was required to calculate Drebick's impact fees by *individually* assessing his development's *direct, specific* impact on *each* of the improvements listed in the City's capital facilities plan.

Nor is there any support to be found in prior cases interpreting the impact fee statutes. In *New Castle Investments v. City of LaCenter*, 98 Wash.App. 224, 989 P.2d 569, *review denied*, 140 Wash.2d 1019, 5 P.3d 9 (2000), a developer challenged the applicability of the city's GMA impact fee ordinance on the grounds that it was adopted two days after the proposed development was approved. The developer argued that, under the vesting statute (RCW 58.17.033), the development was subject only to the "land use control ordinances" in effect at the time the application was perfected. Division Two concluded, however, that the GMA impact fees' "resemblance to taxes" removed them from the definition of

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[7] (...continued)
predated the adoption of GMA impact fees and aimed to mitigate the direct impact of a development project, the dissent nevertheless claims that King County's designation of a "park service area" immediately surrounding the new development "provides an example of an appropriate ordinance" for Olympia. *Id.* at 12.

"'land use control ordinance.'" *Id.* at 235, 989 P.2d 569. Noting that the GMA impact fee statutes were "codified among excise taxes in RCW 82," the *New Castle* court distinguished the fees from the regulatory exactions of SEPA, the LTA, and RCW 82.02.020: "By the clear language of the statute, GMA impact fees are not intended to compensate local governments for the *direct impacts* of specific development projects *on specific components of local infrastructure systems* or to finance programs that regulate development." *Id.* at 235-36, 989 P.2d 569 (emphasis added). In *Wellington River Hollow, L.L.C. v. King County*, 121 Wash.App. 224, 54 P.3d 213 (2002), *review denied*, 149 Wash.2d 1014, 70 P.3d 965 (2003), Division One of the Court of Appeals agreed with the *New Castle* court's interpretation of RCW 82.02.050(3) and rejected a developer's claim that school impact fees imposed on a proposed apartment complex had to "specifically benefit" the students generated by the development. *Id.* at 237, 989 P.2d 569.

CONCLUSION

The GMA impact fee statutes permit local governments to base impact fees on area-wide infrastructure improvements reasonably related and beneficial to the particular development seeking approval. We agree with the superior court's conclusion that "this 'rational' [or 'relational'] standard . . . [is] broader than the standard under [SEPA or the LTA]." CP at 674. As the superior court correctly determined, the hearing examiner erred in concluding that the GMA impact fee statutes required the City to calculate Drebick's impact fee by making individualized assessments of the Drebick development's direct impact on each improvement planned in a service area. We hold that the City's method for calculating transportation

impact fees complied with the plain language of the GMA impact fee statutes. We therefore reverse the Court of Appeals.

/s/ Owens, J

WE CONCUR:

/s/ C. Johnson, J.

/s/ Bridge, J.

/s/ Madsen, J.

/s/ Fairhurst, J.

/s/ Becker, J.P.T.

SANDERS, J. (dissenting).

The City of Olympia (City) claims the fees at issue here "are, in essence, excise taxes on new development generally . . ."[1] "because the ultimate purpose of the fees is to generally raise revenue to fund needed public facilities and infrastructure."[2] I agree. The resulting problem for the City is therefore twofold: (1) the City has not been statutorily authorized to impose an excise tax on new development and (2) the City has been specifically prohibited by RCW 82.02.020 from doing just that. To put it simply, the only way these fees could pass statutory, much less constitutional,[3] muster is that

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[1] Br. of Resp't City of Olympia (Ct.App.29018-9-II) at 12.

[2] *Id.* at 13.

[3] Absent express authorization, municipalities may not impose a tax (*Hillis Homes, Inc. v. Snohomish County*, 97 Wash.2d 804, 809, 650 P.2d 193 (1982), Wash. Const. art. VII, § 2), and municipalities may not tax contrary to the general laws (*R/L Assoc., Inc. v. City of Seattle*, 113 Wash.2d 402, 780 P.2d 838 (1989) and *San Telmo*

(continued...)

they be true "impact fees" as that term is defined and limited by the legislature, which excise taxes clearly are not.

Having stated the general proposition, I repair to the facts which demonstrate these fees are indeed excise taxes on new construction, precisely as contended by the City.

In 1998 petitioner Drebick Investments (Drebick) sought land use approval from the City to construct a four-story office building complex at a corner of the city boundary near an exit to Highway 101. The municipality imposed a $132,000 traffic fee as a condition to new development based upon contemplated cost of citywide traffic projects without regard to the specific impact the Drebick development might or might not have on any proposed project or any benefit the Drebick development would derive from the new public facilities.[4] Drebick contended any additional traffic added by his construction would make minimal, if any, use of the contemplated improvements because of the remote proximity

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[3] (...continued)
Assocs. v. City of Seattle, 108 Wash.2d 20, 24, 735 P.2d 673 (1987), Wash. Const. art. VII, § 5). *See also Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987), discussion *infra* pp. 14-17.

[4] The City projected the cost of all transportation improvement projects inside the urban growth area (UGA) needed to provide capacity for all new growth over a six year period. The City then projected the total number of new afternoon peak hour trips with one end inside the UGA, and it divided the cost by the number of trips. This per-trip cost was then applied to new development by multiplying the derived figure by the number of trips the new development would generate, *regardless of whether any of those trips would actually use any of the new transportation improvement projects.* Clerk's Papers (CP) at 21 (Findings and Decision of the Hr'g Exam'r of the City of Olympia, Finding 32) (Nov. 2, 2000) (Hr'g Exam'r Findings and Decision).

of his development to those projects and traffic patterns which would substantially exclude their use by new development traffic.

The matter ultimately proceeded to the City's hearing examiner. He factually found:

> 36. Under Olympia's method, a transportation impact fee does not depend on or vary with the location within the City of the development charged. The fee does not depend on or take into account whether the development charged actually contributes any trips to any of the project groups on which the fee is based.
>
> . . . .
>
> 39. Under Olympia's method, the transportation impact fee assessed the Drebick proposal is not proportionate to or reasonably related to the service demands or needs created by the Drebick proposal on each of the individual project groups on which the impact fees are based.
>
> 40. The only manner in which the Drebick proposal could be benefited by specific transportation improvements projects it will not use, considered individually, is if those improvements relieve traffic pressure on other links used by the Drebick proposal or if they improved emergency response to the Drebick proposal. No evidence was submitted showing this for any of the individual improvements. Under Olympia's method, the transportation impact fees assessed the Drebick proposal may be used for individual transportation facilities which do not reasonably benefit the Drebick proposal.

Clerk's Papers (CP) at 22-23 (Hr'g Exam'r Findings and Decision). No error has been assigned to these findings. Thus they are verities for the purposes of this appeal. *Henderson Homes, Inc. v. City of Bothell*, 124 Wash.2d 240, 244, 877 P.2d 176 (1994).

Notwithstanding, the City conditioned Drebick's use and development of his property upon payment of a transportation "impact fee" of more than $132,000. The hearing examiner set aside this fee because of its perceived conflict with chapter 82.02 RCW. The superior court then reversed the hearing examiner. However, the Court of Appeals reversed again, affirmed the hearing examiner, and remanded for further proceedings. In this context, our majority characterizes the issue to be determined:

> In calculating the transportation impact fees imposed on the Drebick development, did the city comply with the statutory standards set forth in RCW 82.02.050-.090 for apportioning such fees?

Majority at 3. Although I generally agree with the majority's characterization of the issue as a statutory one, the majority assumes the answer to the real question which is whether we should characterize these fees as "impact fees," the only fees permitted by RCW 82.02.050 through .090.

The relevant statutes are contained in chapter 82.02 RCW. RCW 82.02.020 is a broad prohibition on development fees with certain exceptions:

> Except as provided in RCW 82.02.050 through 82.02.090, no county, city, town, or other municipal corporation shall impose any tax, fee, or charge, either direct or indirect, on the construction or reconstruction of . . . commercial buildings . . . .

The $132,000 exaction at issue is obviously within the scope of the aforementioned text since it is imposed on the

construction of commercial buildings. Moreover, and just as clearly, it is statutorily barred unless it falls within the statutory exemptions codified in RCW 82.02.050 through .090, all of which relate to "impact fees." As used in the statute, "impact fee" is a term of art defined as:

> [A] payment of money imposed upon development as a condition of development approval to pay for public facilities needed to serve new growth and development, and that is reasonably related to the new development that creates additional demand and need for public facilities, that is a proportionate share of the cost of the public facilities, and that is used for facilities that reasonably benefit the new development. . . .

RCW 82.02.090(3). Impact fees are therefore by definition site specific to the new development, unlike taxes which generally raise revenue to fund needed public facilities without regard to the impact on or benefit derived by the new individual development from those facilities. *Arborwood Idaho, LLC v. City of Kennewick*, 151 Wash.2d 359, 371, 89 P.3d 217 (2004).[5] Keeping this distinction in mind, it is telling that even the City of Olympia claims the fees at issue here "are, in essence, excise taxes on new development generally." Br. of Resp't City of Olympia (Ct.App.29018-9-II) at 12. The problem is "excise taxes on new development generally" cannot meet the definition of "impact fees" because taxes have no necessary relationship to meeting the additional demands of "the new development" nor do they necessarily benefit "the new

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[5] The majority asserts "merely labeling the GMA impact fees either taxes or regulatory fees will not be dispositive here." Majority at 3 n.1. I disagree because taxes by their nature cannot be "impact fees" as statutorily defined, and only impact fees are excepted from the broad statutory prohibition.

development" by building facilities to be actually used by the new development.

RCW 82.02.050(3) reinforces the statutory definition with express limitations:

> The impact fees:
>
> (a) Shall only be imposed for system improvements that are reasonably related to *the new development;*
>
> (b) Shall not exceed a proportionate share of the costs of system improvements that are reasonably related to *the new development;* and
>
> (c) Shall be used for system improvements that will reasonably benefit *the new development.*

(Emphasis added.) RCW 82.02.060 prescribes the format of a local impact fee ordinance:

> **Impact fees—Local ordinances—required provisions.** The local ordinance by which impact fees are imposed:
>
> (1) Shall include a schedule of impact fees which shall be adopted for each type of development activity . . . . The schedule shall be based upon a formula or other method of calculating such impact fees. In determining proportionate share, the formula or other method of calculating impact fees shall incorporate, among other things, the following:
>
> (a) The cost of public facilities necessitated by new development;
>
> (b) An adjustment to the cost of the public facilities for past or future payments . . . .;

(c) The availability of other means of funding . . . .;

(d) The cost of existing public facilities improvements; and

(e) The methods by which public facilities improvements were financed;

. . . .

(4) Shall allow the county, city, or town imposing the impact fees to adjust the standard impact fee at the time the fee is imposed to consider unusual circumstances in specific cases to ensure that impact fees are imposed fairly;

(5) Shall include a provision for calculating the amount of the fee to be imposed on a *particular development* that permits consideration of studies and data submitted by the developer to adjust the amount of the fee;

(6) Shall establish one or more reasonable service areas within which it shall calculate and impose impact fees for various land use categories per unit of development . . . .

RCW 82.02.060 (emphasis added).

I agree with the majority that the statutory terms "the new development" and "development activity" and "particular development" relate to a specific proposed project, not projected community development in the aggregate. Majority at 6-9. However, the majority essentially fails to recognize that "Impact fees" as that term is used in RCW 82.02.060 is a term of art specifically defined to be "reasonably related to *the new development* that creates additional demand and need for public facilities, that is a proportionate share of the cost of the public facilities, and that is used for facilities that reasonably benefit

the new development." RCW 82.02.090(3) (emphasis added). Further, the majority ignores RCW 82.02.050, which specifically *limits* impact fees to (a) system improvements that are reasonably related to *the new development,* (b) the proportionate share of the cost of those reasonably related system improvements reasonably related to *the new development,* and (c) system improvements that will reasonably benefit *the new development.* Rather the fees allowed by the Olympia ordinance are not calculated to specifically cure an impact of "the new development," nor are they for projects which serve the new development. Rather this fee is based on the aggregate of *all* new development without regard to the cause, consequence, or proportionality as it relates to the specific development at issue here.

In the context of this case the fee imposed on Drebick under the municipal ordinance does not meet the definition of "impact fee" because the projects funded by the fee were not reasonably necessitated by the Drebick development nor would they be necessarily even used by the Drebick development. In the same sense they violate the limitation criteria in RCW 82.02.050(3).

The conclusion that the definition and limitation clauses necessarily apply to the application of any ordinance adopted pursuant to RCW 82.02.060 is buttressed by that statute's reference to "impact fees" and other language which requires site specific consideration by any proper ordinance. Section .060(4) of the statute requires the ordinance to adjust the fee imposed "to consider unusual circumstances in specific cases to ensure that impact fees are imposed fairly." Subsection (5) requires the ordinance to "include a provision for calculating the amount of the fee to be imposed on a *particular development* that permits consideration of studies and data submitted by the developer to adjust the amount of the fee." And subsection (6) requires the ordinance "[s]hall establish one or more reasonable service areas within which it shall calculate

and impose *impact fees* for various land use categories per unit of development." (Emphasis added.) Each of those provisions specifically contemplate, consistent with the definition of impact fee and the limitations on an impact fee, that the fee be tailored to the actual impact of the specific individual new development notwithstanding the prescriptive manner of calculating the fee. The "reasonable" service areas requirement also highlights the proposition that a proper ordinance would establish service areas which actually serve the proposed development.

As to the last point, the majority seems to confuse the propriety of the service area designation with the quite independent analysis of whether the resulting fee imposed as a precondition to development meets the statutory definition of "impact fee." *See* majority at 17-20. Just because RCW 82.02.060 provides the statutory authority and outlines the necessary components of a local ordinance to assess "impact fees" within a "reasonable service area[ ]," does not mean that the resulting fee will actually *be* an "impact fee" as statutorily defined. That statutory definition includes the requirement that the fee "is reasonably related to the new development that creates additional demand and need for public facilities . . . ." RCW 82.02.090(3). Therefore, by the majority's own statutory analysis the ultimate fee must be calculated on site specific criteria. Whether or not a local ordinance which sets up a fee schedule based upon a formula and a service area actually produces a legitimate "impact fee" must, however, be determined on an as applied basis, to the Drebick building, for example.

The crux of the majority's flaw in reasoning is its assumption, absent statutory or precedential support, that any impact fee ordinance that meets the procedural requirements contained in RCW 82.02.060 *per se* produces a statutory impact fee tailored to the requirements of proportionality and reasonable causation by, and reasonable benefit to, the specific

development project at issue. Majority at 9-10. The majority's conclusion that "the legislature did *not* require that the funded facilities be *directly* or *specifically* related and beneficial to the development seeking approval,"[6] is therefore most problematic. Majority at 12.

The majority assumes this conclusion through an unanalyzed premise: a city or county is permitted to draw a single service area encompassing the whole of that city or county, and therefore all "system improvements" within that service area may be properly charged to any new development consistent with the statute. The majority's conclusory statement, "As permitted in RCW 82.02.060(6), the City 'elected to base its fee structure on a single service area coterminous with its Urban Growth Area,'" majority at 16,[7] is devoid of any discussion of the actual statutory requirement. Indeed, the actual text requires the "local ordinance by which impact fees are imposed . . . (6)[s]hall establish one or more *reasonable* service areas within which it shall calculate and impose impact fees for various land use categories per unit of development." RCW 82.02.060.

Trimen Development Co. v. King County, 124 Wash.2d 261, 877 P.2d 187 (1994) provides an example of an appropriate ordinance, although its facts arose before the

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[6] "Directly" and "specifically" are not statutory terms, nor are they derived from the relevant constitutional cases. Such terms are easily confused and misunderstood when divorced from the statutory and constitutional context. As noted, *supra*, the requirement of a nexus and rough proportionality—which define the "reasonable" relationship under the statute—dictate a certain level of connection between the impact fee and the impacts of the development. Whatever that level of connection, whether directly, specifically, reasonably, or roughly related, it is not present in this case.

[7] The majority repeats its conclusion at page 14 without further analysis.

adoption of sections .050 through .090. Under that ordinance, King County imposed park development fees on new construction. Although King County did not conduct a site specific study relating to the Trimen Development, it did calculate the general deficit of parks in the vicinity and the statistical probability of additional park use by each unit of new residential development. The fee was to be expended only in the "park service area" of the new development, an area roughly the size of elementary school boundaries. This methodology, we held, adequately demonstrates the additional need for park space necessitated by each new unit of residential development along with the cost of acquiring it within the specific area to be used by the specific new development. We went on to specifically distinguish the park fee as there calculated from a "tax" which not only lacked legislative authorization but would violate the prohibition of RCW 82.02.020, holding these park fees "are reasonably necessary as a direct result of the proposed development," and are required to mitigate the direct impact of the development. *Id.* at 270-71, 877 P.2d 187 (quoting RCW 82.02.020). However in the case at bar, as acknowledged by the City of Olympia, the fees at issue are in the nature of taxes to fund generalized public improvements which cost money, not impact fees.

Moreover, it is important to notice that the park fees were sustained in *Trimen* because they were calculated based upon a "park service area" around the new development only approximately the size of elementary school boundaries, i.e., an area where projected new residents would reasonably recreate in any new park space to be acquired. However, the difference between the park service area approved in *Trimen* and the citywide service area in the case at bar is a qualitative difference of exponential magnitude. Trimen residents would probably use the new park space whereas Drebick customers would not necessarily use new traffic improvements geographically remote from the Drebick building.

But by the majority's logic, it is "reasonable" for a city which comprises 17 square miles,[8] has almost 80 miles of major roads,[9] and has a population of 43,330 people,[10] to draw a *single* service area and therefore any resulting fee must be a legitimate "impact fee."

Thus, King County could define its service area as the entire county. A new resident of Vashon Island could be made to pay fees for a system improvement made in Skykomish, even though the Vashon resident may *never* use a road improvement located 60 miles—and one large body of water—away. Or perhaps Stevens County might decide to charge "new development" located outside Northport for a transportation improvement located outside Tumtum, 80 miles distant? Or San Juan County could charge developers on Orcas Island to add a lane to a road on Lopez Island? All this is perfectly sanctioned by the majority opinion, although none of the resulting fees imposed under such ordinances would be reasonably related to the new development nor reasonably benefit the new development and hence neither fits the statutory definition of "impact fee" nor complies with RCW 82.02.050.

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[8] *See* U.S. Census Bureau, State and County Quickfacts, http://quickfacts.census.gov/qfd/states/53/5351300.html (last visited Jan. 13, 2006).

[9] Including interstates, arterials, and collectors, but not even including smaller roads.

[10] *See* Municipal Research & Servs. Ctr. of Wash., http://www.mrsc.org/cityprofiles/cityprofile.aspx?id=167 (last visited Jan 13, 2006). Olympia is the 19th largest city in Washington State. *Id.*, *http:*//www.mrsc.org/subjects/finance/ctytax04p.aspx.

Further, the statutory definition of "service area" belies the majority's conclusion that Olympia appropriately drew a single service area for the entire city. RCW 82.02.090(8) defines "[s]ervice area" as "a geographic area defined by a county, city, town, or intergovernmental agreement in which a defined set of public facilities *provide service* to development within the area." (Emphasis added.) A road which no customer, resident, or visitor to the new development will use hardly provides service to that development.

In addition to its failure to properly follow the "reasonable" requirement in relation to the scope of the service area, which might at least begin to re-moor the statute to its constitutional pilings, the majority fails to apply "reasonably related" or "reasonably benefit" according to the expressed intent of the legislature. The majority does this by accepting unchallenged the assertion that "Every land use benefits in a general sense from a smoothly functioning transportation system with adequate capacity *in the jurisdiction in which it is located.*" Majority at 17 (quoting CP at 22 (Hr'g Exam'r Findings and Decision, Finding 35)). Yes, but that is what taxes are for.

At this level of abstraction every improvement in any city or county is *per se* reasonably related to new development in that city or county and reasonably benefits new development in that city or county. The "reasonableness" protections of the statute, the definition of impact fees, the statutory limits on impact fees, are thus rendered a nullity. The legislature could have composed a much simpler statute by simply authorizing local governments to impose jurisdiction-wide excise taxes on all new development without regard to the impact that new development might have on public facilities. But it didn't. Yet that's what the majority gives us.

Most fundamentally only "system improvements" can be financed by "impact fees," RCW 82.02.050(3), but such system improvements must still be reasonably related to and reasonably benefit the new development to be "impact fees." RCW 82.02.050(3)(a)-(c).

However this ordinance requires *no* relation between the new development and the public facility, yet alone a "reasonable" one. But we need not rely on the common understanding of the text. The legislative history, well documented by the Court of Appeals, conclusively demonstrates that the standard of "reasonableness" the legislature intended to be applied with regard to RCW 82.02.050(3)(a)-(c) and 82.02.060(6) is the *Nollan/Dolan* standard.[11]

The Court of Appeals extensively reviewed the legislative history of House Bill 2929,[12] which was the initial legislation of what became known as the Growth Management Act (chapter 36.70A RCW). For our purposes the most important conclusion to be drawn from the legislative history is the legislature's deliberate use of the *identical* terms the United States Supreme Court used to describe the "nexus" requirement of the Fifth Amendment: "reasonably related to." *City of Olympia v. Drebick*, 119 Wash.App. 774, 785, 83 P.3d 443 (2004) (quoting *Nollan*, 483 U.S. at 838, 107 S.Ct. 3141). As the Court of Appeals noted:

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[11] *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987); *Dolan v. City of Tigard*, 512 U.S. 374, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994).

[12] *See City of Olympia v. Drebick*, 119 Wash.App. 774, 781-85, 83 P.3d 443 (2004).

> When the 1990 legislature was considering the GMA, it undoubtedly knew about *Nollan*, which was then the *only* case in which the United States Supreme Court had addressed the propriety of conditioning a building permit on the exaction of private property without compensation. Thus, we infer that the 1990 legislature did not use *Nollan*'s phrase ("reasonably related to") by coincidence; instead, we think, the legislature used the same phrase with intent to adopt *Nollan*'s meaning and assure the new statute's constitutionality. *Nollan* had used the phrase ("reasonably related to") to mean a link or "nexus" between the public problem to be alleviated and the individualized impacts of the permittee's *specific* project, and we conclude that the 1990 legislature used the same phrase in the same way.

Id.[13]

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[13] Further, the legislature is presumed to be familiar with judicial decisions on the subject on which it is legislating. *Daly v. Chapman*, 85 Wash.2d 780, 782, 539 P.2d 831 (1975).

Nollan, of course, required a nexus between the exaction[14]

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[14] The majority claims "nor does the dissent mention that neither the United States Supreme Court nor this court has determined that the tests applied in *Nollan* and *Dolan* to evaluate land exactions must be extended to the consideration of fees imposed to mitigate the direct impacts of a new development, much less to the consideration of more general growth impact fees imposed pursuant to statutorily authorized local ordinances." Majority at 13-14. Quite correct, because the United States Supreme Court *has* vacated statutorily imposed monetary impact fees for further consideration in light of *Dolan*. *Ehrlich v. City of Culver City*, 512 U.S. 1231, 114 S.Ct. 2731, 129 L.Ed.2d 854 (1994). On remand the California Supreme Court "reject[ed] the proposition that *Nollan* and *Dolan* are entirely without application to monetary exactions." *Ehrlich v. City of Culver City*, 12 Cal.4th 854, 876, 50 Cal.Rptr.2d 242, 911 P.2d 429, 444 (1996). *See also Benchmark Land Co. v. City of Battle Ground*, 103 Wash.App. 721, 14 P.3d 172 (2000), *aff'd on other grounds by Benchmark Land Co. v. City of Battle Ground*, 146 Wash.2d 685, 49 P.3d 860 (2002) (holding that *Dolan* proportionality test applies to impact fees); Sandra M. Stevenson, ANTIEAU ON LOCAL GOVERNMENT LAW 4-56, at § 56.05 (2d ed.2005); ZONING AND LAND USE CONTROLS, PART II, MODERN ZONING TRENDS, CH. 9: EXACTIONS, IMPACT FEES AND OTHER LAND DEVELOPMENT CONDITIONS, 2-9 ZONING AND LAND USE CONTROLS § 9.02, "Nexus, Proportionality, and Takings: Nollan, Dolan and Progeny, [4] Applicability of *Nollan* and *Dolan* to All Land Development Conditions" (Matthew Bender 2005) and *id.*, § 52A.04 at 8-52A, "Established and Emerging Rules in Takings Cases, [2] Categorical Rules in Exactions Cases, [c] Combined Effect of the 'Rational Nexus' and 'Rough Proportionality' Tests" (citing *Benchmark Land Co.*, 94 Wash.App. 537, 972 P.2d 944, concluding that *Nollan* and *Dolan* tests apply to fees); *City of Portsmouth v. Schlesinger*, 57 F.3d 12, 16-17 (1st Cir.1995) (impact fee unlawful exaction); *Consumers Union of U.S., Inc. v. State*, 5 N.Y.3d 327, 354- 355, 806 N.Y.S.2d 99, 840 N.E.2d 68 (2005) (fee is exaction to which *Nollan* and *Dolan* apply); *Home Builders Ass'n v. City of Beavercreek*, 89 Ohio St.3d 121, 128, 729

(continued...)

and the individualized impacts of the specific project. *Nollan*, 483 U.S. at 837, 107 S.Ct. 3141. *Dolan* extended *Nollan* by additionally requiring that the exaction be roughly proportional to the impacts of the development. *Dolan*, 512 U.S. at 391, 114 S.Ct. 2309. But even if the legislature had only *Nollan*'s definition of "reasonably related" in mind when it used the exact same phrase, our majority defeats the *Nollan* and the Washington State Legislature's definition.

The citywide averaged fee imposed in this case by definition does not consider the individual impacts of Drebick's development and therefore fails both the *Nollan* test and the requirement that the impact fee be "reasonably related" to the development under RCW 82.02.050(3).[15]

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[14] (...continued)
N.E.2d 349, 356 (2000) (using *Nollan* and *Dolan* tests when "evaluating the constitutionality of an impact fee ordinance"); *Town of Flower Mound v. Stafford Estates, L.P.*, 135 S.W.3d 620, 639-40 (Tex.2004) (applying *Nollan* and *Dolan* to impact fees); J. David Breemer, *The Evolution of the "Essential Nexus": How State and Federal Courts Have Applied Nollan and Dolan and Where They Should Go From Here*, 59 WASH. & LEE L. REV. 373, 390 (2002) (noting "growing recognition that the logic of *Nollan* and *Dolan*" applies to fees).

[15] The majority posits a distinction between a "'*generally* applicable development fee'" and a site specific fee. Majority at 14 n.4 (quoting *Ehrlich v. City of Culver City*, 12 Cal.4th 854, 881, 50 Cal.Rptr.2d 242, 911 P.2d 429, 444, *cert. denied*, 519 U.S. 929, 117 S.Ct. 299, 136 L.Ed.2d 218 (1996)). I think the majority's misimpression might be cured if it placed the quoted material in proper context:

> One of the central promises of the takings clause is that truly public burdens will be publicly borne. Where the regulatory land-use power of local government is deployed against individual property owners through

(continued...)

Finally, the definition of "[p]roportionate share" in RCW 82.02.090(5) supports the conclusion that the legislature intended the *Nollan* definition of "reasonably related" (and also tracks *Dolan*). RCW 82.02.050(3)(b) provides that "impact fees . . . [s]hall not exceed a proportionate share of the costs of system improvements that are reasonably related to the new development." RCW 82.02.090(5) defines "[p]roportionate share" as "that portion of the cost of public facility improvements that are reasonably related to *the service demands and needs of new development.*" This definition clearly defines the amount of impact fees that can be charged in relation to the specific proposed development. The "service

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[15] (...continued)

> the use of conditional permit exactions, the *Nollan* test helps to secure that promise by assuring that the monopoly power over development permits is not illegitimately exploited by imposing conditions that lack any logical affinity to the public impact of a particular land use. The essential nexus test is, in short, a "means-ends" equation, intended to limit the government's bargaining mobility in imposing permit conditions on individual property owners—whether they consist of possessory dedications or the exaction of cash payments—that, because they appear to lack any evident connection to the public impact of the proposed land use, *may* conceal an illegitimate demand--may, in other words, amount to "'out and out . . . extortion.'" (*Nollan, supra,* 483 U.S. at p. 837 [107 S.Ct. at p. 3149, 97 L.Ed.2d at p. 689].).

Ehrlich, 12 Cal.4th at 876, 50 Cal.Rptr.2d 242, 911 P.2d 429. Drebick was indeed subjected to a "conditional permit exaction[ ]" which also "lack [ed] any logical affinity to the public impact of [his] particular land use." *Id.* The fact that the fee was calculated pursuant to a formula the application of which "lack[s] any logical affinity to the public impact of a particular land use" hardly cures the constitutional problem which would exist if the same exaction were imposed in the absence of a formulaic ordinance.

demands" of the new development aren't for a "functioning transportation system," an abstract notion not susceptible to definition in any event, but for certain capacities on specific roadways that will be utilized by the development's customers and employees.

This court's duty is to construe statutes constitutionally if such is possible. *High Tide Seafoods v. State*, 106 Wash.2d 695, 698, 725 P.2d 411 (1986). Given that the legislatively intended definition of "reasonably related to" in RCW 82.02.050 complies with—and indeed is identical to—the requirements of *Nollan* and *Dolan*, a constitutional construction is certainly available. Indeed, we have upheld impact fees while specifically noting *Dolan*'s requirements where a reasonable service area was drawn under an ordinance that required the infrastructure to actually serve the new development. *See Trimen Dev. Co. v. King County*, 124 Wash.2d 261, 274, 877 P.2d 187 (1994).[16]

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[16] The majority's citation to *New Castle Investments v. City of LaCenter*, 98 Wash.App. 224, 989 P.2d 569 (1999), and *Wellington River Hollow, L.L.C. v. King County*, 121 Wash.App. 224, 54 P.3d 213 (2002) are unavailing. *New Castle* was not a case about the validity of impact fees but about whether the impact fees are land use control ordinances for purposes of our state vesting statute. Further, the Court of Appeals specifically noted that *Nollan/Dolan*'s requirement of rough proportionality is not necessarily a direct relationship (which would comport with the "exacting correspondence" rejected in *Dolan*, 512 U.S. at 389-90, 114 S.Ct. 2309), but there still must be a "roughly proportional" relationship—a relationship the *Dolan* court derived specifically from the "reasonable relationship" test adopted by numerous other state courts. *See Dolan*, 512 U.S. at 391, 114 S.Ct. 2309. *Wellington* upheld a school impact fee imposed based on projected student enrollment in the school district from the new development. This was at least *some* link between the impact—more students—and the solution—school improvements. But here the City of Olympia did

(continued...)

The literal text of chapter 82.02 RCW requires an impact fee imposed under RCW 82.02.050-.090 be "reasonably related to" and "reasonably benefit" the new development and that local governments define "reasonable" service areas. The legislature used *Nollan*'s exact language for a reason, and the requirement that there at least be a nexus between the impact of the development and the fee imposed thus defines the "reasonableness" of such fees. But here there is no demonstrated connection between this fee and any impact of this development; just the opposite. Thus I would hold that Olympia's citywide averaged fee as applied here violates RCW 82.02.020.

I dissent.

/s/ Sanders, J.

/s/ J.M. Johnson, J.

/s/ Chambers, J.

I concur in result only.

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[16] (...continued)
not demonstrate any link between the "impact" of the new development and the capital facilities to be built. In *Wellington* some of the improvements were the addition of classrooms at a high school near the development. However, to the extent that *Wellington* held that impact fees could be imposed where no use of the facilities by students from the new development would occur, the Court of Appeals opinion in *Wellington* should not be followed.

Appendix B–1

FILED APR. 13, 2006

THE SUPREME COURT OF WASHINGTON

CITY OF OLYMPIA, a Washington code city, Petitioner, v. JOHN DREBICK and JANE DOE DREBICK, husband and wife, d/b/a/ DREBICK INVESTMENTS, Respondents.	)	NO. 75270-2 **ORDER DENYING MOTION FOR RECONSIDERATION**

The Court [Chief Justice Alexander recused] having considered Respondents' Motion for Reconsideration;

Now, therefore, it is hereby

ORDERED:

That Respondents' Motion for Reconsideration is denied.

DATED at Olympia, Washington this 13th day of April, 2006.

For the Court

/s/ C. Johnson J
ACTING CHIEF JUSTICE

Appendix C–1

FILED JAN. 22, 2004

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

CITY OF OLYMPIA, a Washington code city,	)	No. 29018-9-II
	)	
	)	PUBLISHED OPINION
Respondent,	)	
	)	
v.	)	
	)	
JOHN DREBICK and JANE DOE DREBICK, husband and wife, d.b.a. DREBICK INVESTMENTS,	)	
	)	
	)	
Appellants.	)	

MORGAN, J.—John Drebick wanted to build an office building in the City of Olympia. Citing the Growth Management Act (GMA),[1] the City of Olympia conditioned the building permit for a new office building on his payment of a traffic impact fee. Acting pursuant to Title 15 of its Municipal Code, the City calculated the fee by averaging the cumulative traffic-related impacts of all new office buildings. We assume that when the City made its calculation, it did not determine the

[1] Laws of 1990, 1st Ex. Sess., ch. 17.

individualized traffic-related impacts of the specific building.[2] A hearing examiner held that the fee could not exceed the individualized impacts of the specific building, but the superior court held to the contrary. Agreeing with the hearing examiner, we reverse the superior court and remand for further proceedings.

In 1998, John Drebick sought a building permit from the City of Olympia. He wanted to build a new commercial office building near the City's boundary, just off Highway 101. The building was to have four stories and 54,698 square feet. The City granted the permit on the condition that Drebick help to improve the City's roads by paying a traffic impact fee.

The City calculated the fee by estimating (1) the total square footage of all new commercial office space likely to be built within the city's boundaries and (2) the cost of all road improvement projects that such space would necessitate within the city's boundaries. It then divided (1) into (2) to obtain an average rate per square foot that each new office building should pay toward all of the City's road improvement projects, regardless of any particular building's traffic-related impacts. Multiplying this average rate ($2.95 per square foot) times the number of square feet in Drebick's specific development (54,698) resulted in a fee of $161,359,[3] which Drebick paid under protest.[4]

Drebick appealed to the City's hearing examiner. Citing RCW 82.02.050(3), he argued in part that the City could not

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[2] The parties agree that the City did not determine individualized impacts quasi-judicially, and we assume that the City could not or did not determine such impacts legislatively.

[3] Drebick paid $132,328 in cash and the remainder through certain credits not at issue here.

[4] *See* RCW 82.02.070(4).

impose an impact fee that exceeded the individualized traffic-related effects of his specific project and that those effects would be fully mitigated by a payment of about $29,000. The City countered that it was imposing an excise tax, not a regulatory fee, and thus that it could impose such a tax without regard to the individualized impacts of Drebick's specific project.

The hearing examiner agreed with Drebick. Accordingly, he "reversed on the issue of whether the . . . impact fees comply with the . . . requirements of RCW 82.02.050(3)."[5] He also remanded to the City for "adjustments . . . consistent with this decision."[6]

The City appealed to the Thurston County Superior Court, which reversed the hearing examiner. The superior court held that the City's assessment was "analogous to" a tax and thus that the City did not have to show a "proportional nexus" between its assessment and the traffic-related effects of Drebick's specific project.[7] Drebick tried to appeal directly to the Supreme Court, but that court transferred the case here.

In this court, Drebick contends that state law, and specifically RCW 82.02.050(3), prohibits the City from imposing a traffic impact fee without considering the traffic-related effects of his specific project. The City responds that it was imposing a tax, not a fee, and thus that state law did not require it to consider the effects of Drebick's particular development.

Preliminarily, we emphasize the limits of this opinion. As just noted, the City contends that state law does not require it to

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[5] II Clerk's Papers (CP) at 48, 318.

[6] II CP at 48, 318.

[7] IV CP at 673-74.

consider the individualized impacts of Drebick's specific project. Drebick contends to the contrary. Neither party contends that if state law requires the City to determine the individualized impacts of a specific project, the City did that by enacting an ordinance with categories narrow enough to *constitute* an assessment of individualized impacts. Accordingly, this opinion is limited to the question whether RCW 82.02.050(3) requires the City to consider and determine the individualized impacts of Drebick's specific project. We leave for another day the question whether a city can perform the necessary assessment *legislatively*, by enacting an ordinance with narrow enough categories, or whether a city must perform the necessary assessment *quasi-judicially*, through a hearing examiner or similar official. In short, we analyze the meaning of state law, but not whether the City's ordinance complies with state law.

Beginning our analysis, we have no quarrel with the City's claim that it was imposing a tax rather than a fee.[8] For purposes of this case, however, the distinction is immaterial. RCW 82.02.020 was amended as part of the GMA.[9] It states:

> Except as provided in RCW 82.02.050 through 82.02.090, no county, city, town, or other municipal corporation shall impose any tax, fee, or charge, either direct or indirect, on the construction or reconstruction of residential buildings, commercial buildings, industrial buildings, or on any other building or building space or appurtenance thereto,

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[8] *See New Castle Inv. v. City of LaCenter*, 98 Wash.App. 224, 235-36, 989 P.2d 569 (1999) (although impact fees "resembl[e]" taxes, "[w]e do not hold that [they] are taxes"), *review denied*, 140 Wash.2d 1019, 5 P.3d 9 (2000).

[9] Laws of 1990, 1st Ex. Sess., ch. 17 § 42.

> or on the development, subdivision, classification, or reclassification of land.[10]

Given that RCW 82.02.020 bars either a tax or a fee "except as provided in RCW 82.02.050 through 82.02.090," the question here is not whether the City assessed a tax or fee, but whether the City complied with RCW 82.02.050 through RCW 82.02.090.

RCW 82.02.050(2) authorizes impact fees. Enacted as part of the 1990 GMA,[11] it states:

> (2) Counties, cities, and towns that are required or choose to plan under RCW 36.70A.040 are authorized to impose impact fees[12] on development activity[13] as part of the financing for public

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10 (Emphasis added.)

11 Laws of 1990, 1st Ex. Sess., ch. 17 § 43(2).

12 RCW 82.02.090(3) defines "impact fee" as "a payment of money imposed upon development as a condition of development approval to pay for public facilities needed to serve new growth and development, and that is reasonably related to the new development that creates additional demand and need for public facilities, that is a proportionate share of the cost of the public facilities, and that is used for facilities that reasonably benefit the new development."

13 RCW 82.02.090(1) defines "development activity" as "any construction or expansion of a building, structure, or use, any change in use of a building or structure, or any changes in the use of land, that creates additional demand and need for public facilities."

> facilities,[14] provided that the financing for system improvements[15] to serve new development must provide for a balance between impact fees and other sources of public funds and cannot rely solely on impact fees.

RCW 82.02.050(3) caps impact fees. Enacted at the same time as RCW 82.02.050(2),[16] it states that impact fees

> (a) Shall only be imposed for system improvements that are reasonably related to the new development;
>
> (b) Shall not exceed a proportionate share[17] of the costs of system improvements that are reasonably related to the new development; and
>
> (c) Shall be used for system improvements that will reasonably benefit the new development.

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[14] RCW 82.02.090(7) defines "public facilities" as "(a) [p]ublic streets and roads; (b) publicly owned parks, open space, and recreation facilities; (c) school facilities; and (d) fire protection facilities in jurisdictions that are not part of a fire district."

[15] RCW 82.02.090(9) defines "system improvements" as "public facilities that are included in the capital facilities plan and are designed to provide service to service areas within the community at large, in contrast to project improvements." RCW 82.02.090(6) defines "project improvements" in part as "site improvements and facilities that are planned and designed to provide service for a particular development project and that are necessary for the use and convenience of the occupants or users of the project, and are not system improvements."

[16] Laws of 1990, 1st Ex. Sess., ch. 17 § 43(3).

[17] RCW 82.02.090(5) defines "proportionate share" as "that portion of the cost of public facility improvements that are reasonably related to the service demands and needs of new development."

RCW 82.02.050(3)'s cap is ambiguous in at least two ways. First, do the words "the new development" refer to all developments that are new, or only to the permittee's specific development that is new? Second, do the words "reasonably related to" connote a relationship between the system improvements for which fees are imposed and the cumulative impacts of all new development activity, or between the system improvements for which fees are imposed and the individualized impacts of the permittee's specific project? When the cap states that impact fees "[s]hall only be imposed for system improvements that are reasonably related to the new development[,]" it might mean that impact fees must be "reasonably related to" the cumulative impacts of all new development, or it might mean that impact fees must be "reasonably related to" the individualized effects of the specific new development for which a permit is being issued.

When a statute is ambiguous, our task is to ascertain and effectuate legislative intent.[18] To perform that task, we may use both legislative history[19] and the rules of statutory construction.[20] We turn first to legislative history.

House Bill (HB) 2929 was the GMA's precursor. As introduced on January 26, 1990, HB 2929 would have authorized a city to impose impact fees for public improve-

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[18] *Morgan v. Johnson*, 137 Wash.2d 887, 892, 976 P.2d 619 (1999); *Whatcom County v. City of Bellingham*, 128 Wash.2d 537, 546, 909 P.2d 1303 (1996).

[19] *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wash.2d 1, 11-12, 43 P.3d 4 (2002); *In re F.D. Processing, Inc.*, 119 Wash.2d 452, 460, 832 P.2d 1303 (1992).

[20] *Vance v. Dep't of Ret. Sys.*, 114 Wash.App. 572, 577, 59 P.3d 130 (2002), *review denied*, 149 Wash.2d 1028, 78 P.3d 657 (2003); *Parkridge Assoc., Ltd v. Ledcor Indus., Inc.*, 113 Wash.App. 592, 602, 54 P.3d 225 (2002).

ments related either to the individual impacts of a specific project or to the cumulative impacts of all similar projects.[21] As introduced, HB 2929 lacked a cap or limitation like that later incorporated into RCW 82.02.050(3). It stated in part:

> Impact fees may be required to mitigate potential impacts on public facilities and public services . . . arising from development activity that is authorized by the issuance of a permit . . . . *Such impacts could arise from the development activity itself, or the cumulative impact arising from development activity.*[22]

By the time HB 2929 passed the House, it had been amended in committee.[23] But it still did not contain a cap or limitation, and it still would have authorized a city to impose impact fees for public improvements related either to the individual impacts of a specific project or to the cumulative impacts of all similar projects.[24] It stated in part:

> Counties, cities, and towns are authorized to impose impact fees, excise taxes on development activity, or excise taxes on the privilege of engaging in business that constitutes development, to mitigate reasonably related needs for housing relocation impacts and potential impacts on any public facilities

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[21] H.B. 2929, as introduced, 51st Leg., Reg. Sess., § 36(1) (Wash. 1990); HOUSE JOURNAL, 51st Leg., Reg. Sess., at 172-73 (Wash. 1990).

[22] H.B. 2929, as introduced, 51st Leg., Reg. Sess., § 32 (Wash. 1990) (emphasis added).

[23] HOUSE JOURNAL, 51st Leg., Reg. Sess., at 676, 680-81, 684 (Wash. 1990).

[24] ENGROSSED SUBSTITUTE H.B. 2929, 51st Leg., Reg. Sess., § 30(1) (Wash. 1990).

> . . . arising from development activity that is authorized by the issuance of a permit, or other approval, by the county, city, or town. *Such impacts could arise directly or indirectly from the development activity itself or the cumulative impact arising from development activity.*[25]

When HB 2929 reached the Senate, the sponsors of a "striking amendment" proposed to delete the House's language[26] and authorize "the Puget Sound regional growth authority"—but not counties, cities, or towns—to impose impact fees capped at "one percent *of a specific project's* fair market value."[27] During debate on the Senate floor, the sponsor of an amendment to the striking amendment proposed to restore the House's language allowing counties, cities, and towns to base impact fees on either the individual impacts of a specific development or the cumulative impacts of all new development.[28] The amendment to the striking amendment would have stated:

> The legislature intends to assure that taxpayers are no longer unfairly assessed the costs of development of an area by permitting a fair and equitable portion to be assessed through impact fees. It intends to provide for a better base of funding and

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[25] ENGROSSED SUBSTITUTE H.B. 2929, 51st Leg., Reg. Sess., § 30 (Wash. 1990) (emphasis added).

[26] S. AMD. ENGROSSED SUBSTITUTE H.B. 2929, 51st Leg., Reg. Sess. (Wash. 1990); SENATE JOURNAL, 51st Leg., Reg. Sess., at 938 (Wash. 1990).

[27] SENATE JOURNAL, 51st Leg., Reg. Sess., at 1212-13 (Wash. 1990) (emphasis added).

[28] SENATE JOURNAL, 51st Leg., Reg. Sess., at 1233-35 (Wash. 1990).

> for mitigating specifically attributable costs of growth and growth development to the infrastructure of cities, towns, and counties, including but not limited to roads, schools, bridges, parks, and recreational facilities. *Such impacts may arise directly or indirectly from the development activity itself or from the cumulative impact arising from development activity.*[29]

After rejecting this amendment to the striking amendment,[30] the Senate approved the striking amendment itself.[31]

The House refused to concur in the Senate's striking amendment.[32] The two houses then batted the bill back and forth,[33] until finally a free conference committee was appointed.[34] The free conference committee crafted entirely new language, obviously as a compromise, by which it proposed to limit impact fees to those "imposed for system improvements that are reasonably related to *the* new

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[29] SENATE JOURNAL, 51st Leg., Reg. Sess., at 1233 (Wash. 1990) (emphasis added).

[30] SENATE JOURNAL, 51st Leg., Reg. Sess., at 1235 (Wash. 1990).

[31] SENATE JOURNAL, 51st Leg., Reg. Sess., at 1235 (Wash. 1990).

[32] HOUSE JOURNAL, 51st Leg., Reg. Sess., at 1293 (Wash. 1990); SENATE JOURNAL, 51st Leg., Reg. Sess., at 1336 (Wash. 1990).

[33] *See* HOUSE JOURNAL, 51st Leg., Reg. Sess., at 1274, 1380 (Wash. 1990); SENATE JOURNAL, 51st Leg., Reg. Sess., at 1336, 1907 (Wash. 1990).

[34] HOUSE JOURNAL, 51st Leg., Reg. Sess., at 1766 (Wash. 1990); SENATE JOURNAL, 51st Leg., Reg. Sess., at 1336 (Wash. 1990).

development."[35] The new language was reported to both houses on April 1, 1990, and enacted by both houses that same day.[36] It was approved by the governor on April 9, 1990,[37] and codified as RCW 82.02.050(3).

Based on this legislative history, we make three observations. First, we observe that the 1990 legislature, with apparent intentionality, omitted any authorization to impose impact fees for system improvements related to the cumulative impacts of all new development. The House passed a provision authorizing impact fees to mitigate *either* the individualized impacts of a particular new development or the cumulative impacts of all new development. Rejecting the House's provision, the Senate passed one that limited impact fees to "one percent *of a specific project's* fair market value."[38] The free conference committee proposed entirely new language—obviously a compromise—that both houses quickly adopted. The free conference committee had the House provision before it, yet chose to omit any reference to "cumulative impacts." As a consequence, it appears to us that when the 1990 legislature adopted its free conference committee's new language—i.e., when the 1990 legislature said that impact fees "shall only be imposed for system improvements reasonably related to the new development"—it was intending to authorize impact fees "reasonably related" to

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[35] HOUSE JOURNAL, 51st Leg., Reg. Sess., at 1867 (Wash. 1990) (emphasis added); SENATE JOURNAL, 51st Leg., Reg. Sess., at 1919 (Wash. 1990) (emphasis added).

[36] HOUSE JOURNAL, 51st Leg., Reg. Sess., at 1962 (Wash. 1990); SENATE JOURNAL, 51st Leg., Reg. Sess., at 1942 (Wash. 1990).

[37] ENGROSSED SUBSTITUTE H.B. 2929, as enacted, 51st Leg., Reg. Sess., at 82 (Wash. 1990).

[38] SENATE JOURNAL, 51st Leg., Reg. Sess., at 1212-13 (Wash. 1990) (emphasis added).

the individualized impacts of a permittee's specific new development, as opposed to impact fees "reasonably related to" the cumulative impacts of all new development.

Second, we observe that the 1990 legislature, following the recommendation of its free conference committee, chose to preface the words "new development" with the definite article "the." We can readily understand why the legislature would have done that if it were intending to authorize impact fees reasonably related to the particular development of each permittee; but we cannot understand why the legislature would have done that if it were intending, as the House had earlier intended, to authorize impact fees reasonably related to the cumulative impacts of all new development.

Third, we observe that the 1990 legislature, again following the recommendation of its free conference committee, used a phrase, "reasonably related to," that it apparently borrowed from *Nollan v. California Coastal Commission*.[39] Decided in 1987 by the United States Supreme Court, *Nollan* was a case in which the Nollans applied for a permit to build a house on beachfront property. The Coastal Commission granted the permit—but only on condition that the Nollans donate an easement across their beachfront for use as a public trail. The Court held that the Commission's condition was an unconstitutional taking of private property without just compensation because the exacted property (the easement) was for a public improvement (the trail) that was not "reasonably related to" the impacts of the specific project (the Nollans' new house). The Court stated:

> The Commission claims . . . that we may sustain the condition at issue here by finding that it is *reasonably related to* the public need or burden that *the Nollans' new house* creates or to which it

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[39] 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987).

> contributes. We can accept, for purposes of discussion, the Commission's proposed test as to how close a "fit" between the condition and the burden is required, because we find that this case does not meet even the most untailored standards.[40]

Clearly then, the Court used the phrase "reasonably related to" to require a connection or "nexus" between the public problem the Commission wanted to alleviate (the public's lack of access along the beach) and the individualized impacts of the Nollan's *specific* project.

When the 1990 legislature was considering the GMA, it undoubtedly knew about *Nollan*, which was then the *only* case in which the United States Supreme Court had addressed the propriety of conditioning a building permit on the exaction of private property without compensation. Thus, we infer that the 1990 legislature did not use *Nollan's* phrase ("reasonably related to") by coincidence; instead, we think, the legislature used the same phrase with intent to adopt *Nollan's* meaning and assure the new statute's constitutionality. *Nollan* had used the phrase ("reasonably related to") to mean a link or "nexus" between the public problem to be alleviated and the individualized impacts of the permittee's specific project, and we conclude that the 1990 legislature used the same phrase in the same way.

Leaving legislative history, we make two additional observations using the rules of statutory construction. First, a municipality's taxing authority must be express.[41] Such

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[40] 483 U.S. at 838, 107 S. Ct. 3141 (emphasis added).

[41] *Okeson v. City of Seattle*, 150 Wash.2d 540, 78 P.3d 1279, 1288 (2003); *Hillis Homes, Inc. v. Snohomish County*, 97 Wash.2d 804, 809, 650 P.2d 193 (1982).

authority must be denied when in doubt,[42] and construed in the taxpayer's favor when ambiguous.[43] These rules apply not only when deciding whether taxing authority exists in the first place, but also when deciding its limits.[44] As already seen, the cap set by RCW 82.02.050(3) is ambiguous; it might limit impact fees to those reasonably related to the cumulative impacts of all new development, or it might limit such fees to those reasonably related to the individualized impacts of a specific project. Even if RCW 82.02.050(2) authorizes a tax rather than a fee, as the City contends, RCW 82.02.050(3) must be construed in Drebick's favor.

Second, every statute should be construed as constitutional if such a construction is reasonably possible.[45] *Nollan v. California Coastal Commission*,[46] the United States Supreme

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[42] *Okeson*, 78 P.3d at 1289; *Ivy Club Investors Ltd. P'ship v. City of Kennewick*, 40 Wash.App. 524, 528, 699 P.2d 782, *review denied*, 104 Wash.2d 1006 (1985).

[43] *Gould v. Gould*, 245 U.S. 151, 153, 38 S. Ct. 53, 62 L. Ed. 211 (1917); *Simpson Inv. Co. v. Dep't of Revenue*, 141 Wash.2d 139, 149, 3 P.3d 741 (2000); *Group Health Coop. of Puget Sound, Inc. v. Dep't of Revenue*, 106 Wash.2d 391, 401, 722 P.2d 787 (1986); *City of Puyallup v. Pac. N.W. Bell Tel. Co.*, 98 Wash.2d 443, 448, 656 P.2d 1035 (1982); *Dep't of Revenue v. Hoppe*, 82 Wash.2d 549, 552, 512 P.2d 1094 (1973).

[44] *Hoppe*, 82 Wash.2d at 552, 512 P.2d 1094 (construing tax cap); *see Okeson*, 78 P.3d at 1288 (applying tax cap).

[45] *High Tide Seafoods v. State*, 106 Wash.2d 695, 698, 725 P.2d 411 (1986); *State v. Spencer*, 75 Wash.App. 118, 121, 876 P.2d 939 (1994), *review denied*, 125 Wash.2d 1015, 890 P.2d 20 (1995).

[46] 483 U.S. at 825, 107 S. Ct. 3141.

Court case we described above, and *Dolan v. City of Tigard*,[47] a United States Supreme Court case from 1994, are the leading authorities on when it is constitutional to exact property by conditioning a permit. In *Burton v. Clark County*,[48] we analyzed those cases as follows:

> In our view, *Nollan*, *Dolan*, and their Washington progeny stand for at least four propositions. First, when the government conditions a land-use permit, it must identify a public problem or problems that the condition is designed to address. If the government can identify only a private problem, or no problem at all, the government lacks a "legitimate state interest" or "legitimate public purpose[ ]" in regulating the project. Thus, the *Nollan* Court characterized a "condition for abridgement of property rights through the police power" as "a 'substantial advanc[ing]' of a legitimate state interest." The *Dolan* Court said that to evaluate Dolan's takings claim, it had to "determine whether the 'essential nexus' exists between the 'legitimate state interest' and the permit condition exacted by the city." . . .
>
> Second, the government must show that the development for which a permit is sought will create or exacerbate the identified public problem. This is the same as to say that there must be a relationship (nexus) between the development and the identified public problem; that the necessary relationship will exist if the development will create or exacerbate the identified problem; but that the necessary

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[47] 512 U.S. 374, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994).

[48] 91 Wash.App. 505, 958 P.2d 343 (1998), *review denied*, 137 Wash.2d 1015, 978 P.2d 1097 (1999).

relationship will not exist if the development will not adversely impact the identified public problem. Thus, the *Nollan* Court rejected an easement that would have improved public access to the beach, even though the Commission's staff report said improved public access was needed, because the Nollans' project, replacing a bungalow with a new house, would not make the identified public problem, lack of public access, any worse than before. Similarly, the *Dolan* court rejected Tigard's exaction of a floodplain easement that would have enhanced the public's recreational opportunities, even though such opportunities were needed, because Dolan's project, a larger retail outlet, would not make the identified public problem, the public's lack of recreational opportunities, any worse than before. These holdings are consistent with the fundamental purpose of the Takings Clause, which is *not* to bar government from requiring a developer to deal with problems of the developer's own making, but which *is* "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."

Third, the government must show that its proposed condition or exaction (which in plain terms is just the government's proposed solution to the identified public problem) tends to solve, or at least to alleviate, the identified public problem. In other words, the government must show a relationship (nexus) between the proposed solution and the identified problem, and such relationship cannot exist unless the proposed solution has a tendency to solve or alleviate the identified problem. Thus, the *Nollan* Court rejected the exaction of an easement

along the beach, even though the Nollans' new house would exacerbate the inability of passersby to see the ocean from the road, because allowing people to walk on the beach had no tendency to restore the view from the road. Interestingly, however, the *Nollan* Court would have allowed the exaction of "a viewing spot on their property for passersby with whose sighting of the ocean their new house would interfere," because an exaction of that type would have tended to restore the view from the road. The *Dolan* Court likewise rejected the exaction of an easement for a pedestrian/bike path, because the fact-finding administrative tribunal had failed to find that such an easement would have (as opposed to *could* have) a tendency to solve or alleviate traffic congestion. Both cases represent the idea that government acts arbitrarily and irrationally, and thus outside the scope of its police power, when it mandates a solution (i.e., a condition or exaction) that has no tendency to solve the identified problem.

Fourth, the government must show that its proposed solution to the identified public problem is "roughly proportional" to that part of the problem that is created or exacerbated by the landowner's development. . . . [T]he *Dolan* Court posed the question, "[W]hat is the required degree of connection between [1] the exactions imposed by the city and [2] the projected impacts of the proposed development." *It answered by saying that the required connection was a "reasonable relationship" best described by the term "rough proportionality," and that the government "must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development."*

> . . . The purpose, once again, is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole," while at the same time leaving government free to require a developer to rectify public problems insofar as the developer has created such problems.
>
> When combined, these four propositions boil down to two relationships: a relationship between the project and the identified public problem, and a relationship between the identified public problem and the proposed solution to that problem. . . . The ultimate goal is to show that the proposed condition or exaction (i.e., the proposed solution to an identified public problem) is reasonably related to all or part of an identified public problem that arises from (i.e., is created or exacerbated by) the development project. Unless the government makes this showing, it lacks a "legitimate state interest" or a "legitimate public purpose" in imposing the condition or exaction.[49]

In *Benchmark v. City of Battle Ground*,[50] we held that *Nollan* and *Dolan* apply to an exaction of money as well as to an exaction of land. We said:

> Although the condition exacted here was money, not land, we conclude that the *Dolan* proportionality test applies. . . .

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[49] 91 Wash.App. at 520-24, 958 P.2d 343 (footnotes omitted) (final emphasis added).

[50] 94 Wash.App. 537, 972 P.2d 944 (1999); 103 Wash.App. 721, 14 P.3d 172 (2000), *aff'd on other grounds*, 146 Wash.2d 685, 49 P.3d 860 (2002).

Although *Del Monte Dunes*[51] defines "exactions" as "decisions conditioning approval of development on the dedication of property," we emphasize the similarity of exacting land and money. If the government in *Nollan* and *Dolan* had exacted money rather than land and then purchased land to solve the problems, the same questions would arise: was the money exacted for and used to solve a problem connected to the proposed development? (*Nollan.*) And was the amount of money exacted roughly proportional to the development's impact on the problem? (*Dolan.*) Surely if the issues for an exaction of money are the same as for an exaction of land, the test must be the same: a showing of "nexus" and "proportionality."

We find no inconsistency between this analysis and the comment in *Del Monte Dunes* that *Dolan* was "inapposite." In *Del Monte Dunes*, the developer did not challenge the City's requirement that part of the land be set aside for a public beach, a buffer zone, a view corridor, and butterfly habitat. Rather, the developer claimed that the City did not intend to allow the development under any circumstances and sought to accomplish this goal through over-regulation. Thus, a *Dolan* proportionality analysis was inapposite in *Del Monte Dunes* because the government did not exact land or money.

Further, if the *Dolan* proportionality test does not apply, the government can exact conditions such as the one here with few limits. The condition advances a legitimate state interest—improving the

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[51] *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 119 S. Ct. 1624, 143 L. Ed. 2d 882 (1999).

> public roads. And the condition does not deny the developer all economically viable use of its land. But the condition also seeks to force "some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." It is this attempted transfer of a public burden that calls for a *Dolan* proportionality test.[52]

In this case, RCW 82.02.050(2)'s grant of authority to impose impact fees will be constitutional if RCW 82.02.050(3)'s cap on such fees is construed to mean that impact fees must be "reasonably related to" the individualized effects of the particular project. RCW 82.02.050(2)'s grant of authority will not be constitutional if RCW 82.02.050(3)'s cap is construed to mean that impact fees need only be "related to" the cumulative impacts of all new development, irrespective of the individualized impacts of the particular project. So that RCW 82.02.050(2) will be constitutional, we construe RCW 82.02.050(3) as requiring that impact fees be "reasonably related to" the individualized impacts of the particular project.

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[52] 103 Wash.App. at 727-28, 14 P.3d 172 (citations omitted). The City argues that Benchmark is wrong or distinguishable, but we disagree on both counts. We note that one Washington commentator has found Benchmark to be "cogently reasoned," 17 WILLIAM B. STOEBUCK, WASHINGTON PRACTICE: REAL ESTATE: PROPERTY LAW 5.5 (Supp. 2003), while another agreed in principle even before Benchmark was decided. Joseph D. Lee, *Sudden Impact: The Effect Of* Dolan v. City of Tigard *On Impact Fees In Washington*, 71 WASH. L. REV. 205, 221 (1986) (*Dolan* "applies to all development exactions, including impact fees").

The City relies on RCW 82.02.060,[53] and especially RCW 82.02.060(6),[54] for the proposition that impact fees are to be calculated according to the cumulative impacts of all new development, as opposed to the individualized impacts of each new development. In our view, however, RCW 82.02.060's methods of calculation are subject to RCW 82.02.050(3)'s cap. The methods of calculation were in prior bills (though not in precisely the same form), whereas the cap was a last-minute compromise crafted and promulgated by the free conference committee.

The City relies on *New Castle v. LaCenter*[55] for the proposition that the assessment imposed here was a tax that need not be "reasonably related to" the individualized impacts of Drebick's specific project. As already discussed, however, it does not matter whether the assessment imposed here was a

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[53] RCW 82.02.060 states in part that a local ordinance by which impact fees are imposed "[s]hall include a schedule of impact fees which shall be adopted for each type of development activity that is subject to impact fees, specifying the amount of the impact fee to be imposed for each type of system improvement. The schedule shall be based on a formula or other method of calculating such impact fees." This language speaks to the amount to be assessed and collected from each type of development activity for each type of system improvement. It does not, however speak to the amount that any particular project is to pay.

[54] RCW 82.02.060(6) provides that a local ordinance by which impact fees are imposed "[s]hall establish one or more reasonable service areas within which it shall calculate and impose impact fees for various land use categories per unit of development[.]" Except for "impact fees," the legislature did not define any of these terms. Given that RCW 82.02.060 is subject to the cap in RCW 82.02.050(3), we need not wrestle with the meaning of these terms.

[55] 98 Wash.App. at 224, 989 P.2d 569.

tax or a fee. Either way, it must comply with RCW 82.02.050 through 82.02.090,[56] including the cap in RCW 82.02.050(3).[57]

The City relies on *Wellington River Hollow v. King County*,[58] but that case is distinguishable. The question there was whether a municipality had complied with the requirements of its own ordinance. The question here concerns the requirements of state law.

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[56] RCW 82.02.020.

[57] We do not overlook the following dictum in *New Castle*: "Although impact fees must be 'reasonably related' to the impact of new development on the public infrastructure, they are not individually calculated for each new development, but rather are based on a general calculation that applies to all new development." 98 Wash.App. at 234, 989 P.2d 569. This statement was not necessary to our decision and is not binding precedent. *DCR, Inc. v. Pierce County*, 92 Wash.App. 660, 683, n.16, 964 P.2d 380 (1998) ("Statements in a case that do not relate to an issue before the court and are unnecessary to decide the case constitute obiter dictum, and need not be followed.") (quoting *State v. Potter*, 68 Wash.App. 134, 150, 842 P.2d 481 (1992)), *cert. denied*, 529 U.S. 1053, 120 S. Ct. 1553, 146 L. Ed. 2d 459 (2000); *Concerned Coupeville Citizens v. Town of Coupeville*, 62 Wash.App. 408, 416, 814 P.2d 243, *review denied*, 118 Wash.2d 1004, 822 P.2d 288 (1991). In any event, this statement is consistent with today's ruling once it is understood that the "general calculation" is made pursuant to RCW 82.02.060, and that RCW 82.02.060 is subject to the cap in RCW 82.02.050(3). *New Castle* did not concern a cap, much less the relationship between a cap and RCW 82.02.060's methods of calculation.

[58] 113 Wash.App. 574, 54 P.3d 213 (2002), *review denied*, 149 Wash.2d 1014, 70 P.3d 965 (2003).

Relying on RCW 64.40.020,[59] Drebick requests costs and reasonable attorney fees. He has not met the predicates of that statute, so we deny his request.[60]

In conclusion, we reverse the superior court and remand for the City to impose an impact fee using any of the methods in RCW 82.02.060, provided that such fee shall not exceed the individualized impacts of Drebick's specific project.

/s/ Morgan, J.
Morgan, J.

We concur:

/s/ Seinfeld, J.
Seinfeld, J.

/s/ Hunt, C.J.
Hunt, C.J.

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[59] RCW 64.40.020 provides in part:

> (1) Owners of a property interest who have filed an application for a permit have an action for damages to obtain relief from acts of an agency which are arbitrary, capricious, unlawful, or exceed lawful authority, or relief from a failure to act within time limits established by law: PROVIDED, That the action is unlawful or in excess of lawful authority only if the final decision of the agency was made with knowledge of its unlawfulness or that it was in excess of lawful authority, or it should reasonably have been known to have been unlawful or in excess of lawful authority.
>
> (2) The prevailing party in an action brought pursuant to this chapter may be entitled to reasonable costs and attorney's fees.

[60] This ruling is limited to costs on fees on appeal and does not affect proceedings stayed below.

Appendix D–1

FILED NOV. 09, 2001

IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

CITY OF OLYMPIA, Petitioner, v. JOHN DREBICK and JOHN DOE DREBICK, husband and wife, d.b.a. DREBICK INVESTMENTS, Respondents.	)	No. 00-2-02152-3 FINAL JUDGMENT
JOHN DREBICK and JANE DOE DREBICK, husband and wife, d.b.a. DREBICK INVESTMENTS, Counter-Petitioners, v. CITY OF OLYMPIA, Counter-Respondent.	)	

THIS MATTER having come before the Court for trial of the Land Use Petition Act appeals filed by the City of Olympia and by John Drebick, d.b.a. Drebick Investments, from the

decision of the City of Olympia's Hearing Examiner of November 2, 2000. The court rendered a written decision on the Land Use Petition Act claims on June 28, 2001 and issued findings of fact and conclusions of law, which are being entered in conjunction with this Final Judgment and are incorporated herein by reference. Given decision on the Land Use Petition Act claims, the parties have agreed to dismiss the remaining claims asserted by Drebick with prejudice.

Therefore, based on the Court's written decision, its findings of fact and conclusions of law, and the stipulation of the parties as to the remaining claims,

It is hereby ADJUDGED, ORDERED AND DECREED that:

1. The Land Use Petition of the City of Olympia is GRANTED.
2. The Land Use Petition of John Drebick is DENIED.
3. The decision of the Hearing Examiner is REVERSED insofar as it set aside the impact fees initially computed by the City of Olympia and AFFIRMED in all other respects.
4. The transportation impact fee for Drebick as derived from Olympia Municipal Code and imposed by the City in the adjusted amount of $132,328.98 is hereby REINSTATED.
5. The remaining claims and counterclaims of Drebick raised in his Answer are DISMISSED WITH PREJUDICE.

DONE IN OPEN COURT this 9th day of November, 2001.

CHRISTINE A. POMEROY
JUDGE

Presented by:

CITY OF OLYMPIA

By /s/ John Vanek
John Vanek, WSBA # 5386
Assistant City Attorney for Petitioner/
Counter Respondent, City of Olympia

PRESTON GATES & ELLIS LLP

By /s/ David J. Lenci
David J. Lenci, WSBA # 7688
Attorneys for Petitioner/Counter-Respondent
City of Olympia

Approved as to Form;
Approved for Entry:

PERKINS COIE

By /s/ Alexander W. Mackie
Alexander W. Mackie, WSBA # 6404
Attorney for Respondents/Counter Petitioners
John and Glenda Drebick and Drebick Investments

Appendix D–4

FILED NOV. 09, 2001

IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

CITY OF OLYMPIA, Petitioner, v. JOHN DREBICK and JOHN DOE DREBICK, husband and wife, d.b.a. DREBICK INVESTMENTS, Respondents.	)	No. 00-2-02152-3 FINDINGS OF FACT AND CONCLUSIONS OF LAW
JOHN DREBICK and JANE DOE DREBICK, husband and wife, d.b.a. DREBICK INVESTMENTS, Counter-Petitioners, v. CITY OF OLYMPIA, Counter-Respondent.	)	

THIS MATTER came before the above-entitled Court for trial of land use petition act appeals filed by the City of Olympia and by John Drebick, dba Drebick Investments, from

the decision of the Hearing Examiner of the City of Olympia rendered on November 2, 2000. The City of Olympia appeared by and through its attorneys of record, David J. Lenci, John Vanek and Jeffrey S. Myers. Drebick appeared by and though its attorney of record, Alexander W. Mackie.

The Court having considered the record before the Hearing Examiner below, the briefs and written submissions of the parties and the argument of counsel, together with the court file herein, issued a written decision on June 28, 2001. A copy of that decision is attached hereto and adopted and incorporated herein by reference. Based upon the foregoing and to the extent not inconsistent with this Court's written decision, the following findings of fact and conclusions of law are hereby entered:

I. FINDINGS OF FACT

1. The findings of the Hearing Examiner contained in his decision issued on November 2, 2000, will not be disturbed, except as otherwise found herein.

2. Findings 39 and 40 are vacated pursuant to RCW 36.70C.130(1)(d). The Hearing Examiner erred by applying an incorrect legal interpretation in determining whether the impact fees in question satisfy the requirements of RCW 82.02.050. The Hearing Examiner's determinations that there is no reasonable benefit to the Drebick project and that the impact fees are not proportionate to or reasonably related to the Drebick project constitute a clearly erroneous application of the law to the facts.

II. CONCLUSIONS OF LAW

1. The City of Olympia's Transportation Impact Fee Ordinance OMC § 15.06.010, et seq., was enacted and implemented by the Olympia City Council in its legislative capacity pursuant to the authority conferred by the Growth Management Act, RCW Ch.82.02.

2. The fees imposed by the City of Olympia pursuant to its Transportation Impact Fee Ordinance are in the nature of excise taxes intended to raise revenue, and are not regulatory fees.

3. The Growth Management Act requires that transportation impact fees, such as those at issue here: (1) only be imposed for system improvements that are reasonably related to the new development; (2) not exceed a proportionate share of the costs of system improvements that are reasonably related to the new development; and (3) be used for system improvements that will reasonably benefit the new development.

4. The standard for analyzing the legality of these general impact fees under the Growth Management Act is broader than the standards used to evaluate direct impact fees allowed under the State Environmental Policy Act, RCW Ch. 43.21C, or the Local Transportation Act, RCW Ch. 39.92.

5. Although general impact fees imposed under RCW 82.02.050 must be "reasonably related" to the impact of new development on the public infrastructure as a whole, they are not independently determined by the specific impacts of each new project that forms a part of the new development, but rather are based upon an analysis of the impacts of the new development upon the City's need for additional capital facilities to serve such new development contemplated by the City's comprehensive plan within the relevant service area.

6. The City Council of Olympia was authorized to assess and impose the transportation impact fees at issue here on a "citywide" system basis.

7. The fees assessed against the Drebick project are proportionate to and reasonably related to the City's jurisdiction-wide need for new transportation improvements necessitated by new development, including the Drebick project.

8. The Hearing Examiner erred by failing to accord proper deference to the legislative decision of the Olympia City Council in enacting and implementing the Transportation Impact Fee Ordinance pursuant to the Growth Management Act and in providing a methodology to determine the fees to be imposed under that Ordinance.

9. The Hearing Examiner exceeded the scope of his authority by invalidating the City's legislatively-adopted Transportation Impact Fee Ordinance under an "as applied" analysis of the transportation impact fee to be imposed on Drebick's proposed project.

10. The Hearing Examiner's conclusions that the fees imposed on Drebick's project violated the Growth Management Act were clearly erroneous and an improper application of the law.

11. As independent grounds for reversing his decision, the Hearing Examiner exceeded his authority as governed by the Olympia Municipal Code.

12. While the Hearing Examiner properly concluded that there were no specific unique or unusual characteristics of the Drebick project that warranted an independent fee calculation, his conclusion that the fees imposed under the ordinance in question were inconsistent with principles of fairness was clearly erroneous and an improper application of the law.

13. As for the Drebick appeal of the Hearing Examiner's decision, the use by the City of Olympia of a six-year period in computing the transportation impact fee for the Drebick project complies with the reasonable relationship and proportionality requirements of the Growth Management Act. See RCW 82.02.050(3) and RCW 82.020.090(5). The conclusions to that effect by the Hearing Examiner are proper and will not be disturbed.

14. The Transportation Impact Fee of $132,328.98 was properly assessed against and imposed upon the Drebick project.

DONE IN OPEN COURT this 9th day of November, 2001.

CHRISTINE A. POMEROY
JUDGE

Presented by:

CITY OF OLYMPIA

By /s/ John Vanek
John Vanek, WSBA # 5386
Assistant City Attorney for Petitioner/
Counter Respondent, City of Olympia

PRESTON GATES & ELLIS LLP

By /a/ David J. Lenci
David J. Lenci, WSBA # 7688
Julie Anne Halter,
Attorneys for Petitioner/Counter-Respondent
City of Olympia

Approved as to Form;
Approved for Entry:

PERKINS COIE

By /s/ Alexander W. Mackie
Alexander W. Mackie, WSBA # 6404
Attorneys for Respondents/Counter Petitioners
John and Glenda Drebick and Drebick Investments

FILED JUN 28, 2001

Superior Court of the State of Washington
For Thurston County

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June 28, 2001

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Letter Opinion

Re: *City Of Olympia vs. John Drebick et ux,.*
Thurston County Cause No. 00-2-02152-3

Dear Counsel:

This case came before the Court for trial on the Petition of the City of Olympia and the Counter-Petition of John Drebick, seeking review pursuant to the Land Petition Act

RCW Ch. 36.70 (c) ("LUPA"), both sides seeking review of the Hearing Examiner's decision on different issues pertaining to the proper amount of City of Olympia's transportation impact fee imposed on a new office building being constructed by Drebick Investments.

The Court finds this fee to be a "general impact" fee as defined by the Growth Management Act (GMA) and is not a direct regulatory fee. As defined in *New Castle Investments v. City of La Center*, 98 W, App. 224, 235, 989 P.2d 569 (1999) these fees are analogous to taxes and intended to raise revenue and are not regulatory of the specific project. The Court finds that the Olympia City Council was acting in their legislative capacity and was authorized to assess such tax and could impose it on a "citywide" system basis. The Court reverses the hearing examiners decision in requiring the City of Olympia to provide a proportional nexus to the project in order to assess this fee. The Court finds the holding of the Hearing Examiner to be clearly erroneous and outside his authority as governed by the ordinance and the GMA.

The GMA requires that the City of Olympia transportation impact fee must (1) only be imposed for system improvements that are reasonable related to the new development; (2) not exceed a proportionate share of the costs of systems improvements that are reasonably related to the new development; and (3) be used for system improvements that will reasonably benefit the new development.

This Court finds that this "rational" standard to be broader than the standard under the State Environmental Policy Act (SEPA) or the Local Transportation Act (LTA) and the evidence establishes this broader "relational" standard.

This Court finds that the City of Olympia Transportation Impact Fee Ordinance OMC § 15.04.010 meets all the criteria outlined in the GMA RCW 82.02 when the city adopted these

fees and specifically that the City's use of the six year Capital Facilities Plan (CFP) is valid.

The Court will uphold the Hearing Examiners finding that there are no unique or unusual circumstances to warrant a deviation from the schedule. Therefore, the director's decision on imposing the entire $132,328.98 in tax assessment for this project will be imposed.

I will sign a Findings of Fact and Conclusions of Law upon presentation of an Order consistent with this ruling.

Sincerely,

/s/ Christine A. Pomeroy
Christine A. Pomeroy
Judge

CAP:jek

Appendix E–1

FINDINGS AND DECISION OF THE HEARING EXAMINER OF THE CITY OF OLYMPIA

CASE NO:

Administrative Appeal No. 98-0059 (Appeal of decision of Director)

APPELLANT:

Drebick Investments
2404 Chandler Court SW
Suite 200
Olympia, WA 98502-6034

APPLICANT:

Drebick Investments
2404 Chandler Court SW
Suite 200
Olympia, WA 98502-6034

SUMMARY OF REQUEST:

This is an appeal of the decision of the Director of the Community Planning and Development Department, issued May 7, 1999, which denied the Appellant's request for an independent fee calculation in the determination of transportation impact fees for a commercial office building.

LOCATION OF PROPOSAL:

The office building at issue is located at 2425 Bristol Court SW in Olympia, on Assessor's Parcel No. 46790005600.

SUMMARY OF DECISION:

The decision of the Director of the Community Planning and Development Department is affirmed in part and reversed in part.

HEARING AND RECORD:

The hearing on this appeal was held before the undersigned Hearing Examiner on May 15, June 12, June 13, and June 22, 2000.

At the hearing, the following individuals testified under oath:

John Drebick
2404 Chandler Court SW
Suite 200
Olympia, WA 98502-6034

Perry Shea, Transportation Engineer
SCA Engineering
677 Woodland Square Loop
Lacey, WA

Todd Stamm, Associate Planner for the City of Olympia
Community Planning and Development Department
837 7th Avenue S.E., P.O. Box 1967
Olympia, WA 98507

Donald R. Samdahl, Transportation Engineer
Mirai Associates Inc.
19110 Bothel Way NE, Suite 202
Bothel, WA 98011

David Smith, Transportation and Traffic Engineer
Olympia Public Works Department
837 7th Avenue S.E., P.O. Box 1967
Olympia, WA 98507

Randy Wesselman, Transportation Engineering Supervisor
Olympia Public Works Department
837 7th Avenue S.E., P.O. Box 1967
Olympia, WA 98507

At the hearing. the following exhibits were admitted as part of the official record of these proceedings:

Exhibit 1. Staff Report by Olympia Community Planning and Development Department for Administrative Appeal No. 98-0059, prepared by Todd Stamm. This Exhibit includes the 15 page Staff Report and Attachments A through L, identified on Page 15 of the Staff Report.

Exhibit 2. Letter dated May 11, 2000 from David Merchant to Thomas R. Bjorgen, with attachment.

Exhibit 3. Attachments 1-6 to the letter of September 17, 1999 from Alexander W. Mackie to Thomas R. Bjorgen.

Exhibit 4. Notebook entitled "Drebick Investments - Bristol Court Office Building - Appeal of Impact Fee Review Decision of May 7, 1999 - Appellant's Exhibits for Hearing" and marked as Ex. 4.

Exhibit 5. Map 6-3 from the Olympia Comprehensive Plan, labeled Transportation 2015.

Exhibit 6. Institute of Transportation Engineers Trip Generation Manual, 5th Edition.

Exhibit 7. Institute of Transportation Engineers Trip Generation Manual, 6th Edition.

Exhibit 8. Overhead transparency of Base Year Network Zone 228.

Exhibit 9. Olympia Urban Growth Area Map dated January 22, 1999.

Exhibit 10. Notebook entitled on its first page as "City of Olympia Exhibits - Drebick Investments - Bristol Court Office Building - Appeal of Impact Fee Review Decision of May 7, 1999" and marked as Ex. 10; except that to the extent they express a legal opinion, Tab 4, p. 12, fourth bullet, Tab 4, p. 16, and Tab 4, p. 18 are not admitted.

Exhibit 11. Graph showing weighted average and linear regression methods of estimating traffic trips and marked as Ex. 11, except the black line in a stair-step configuration to the right of the vertical line extending up from 54,000 is not admitted.

Exhibit 12. Hand drawn illustration of the Heritage, Chandler and Bristol cul-de-sacs.

Exhibit 13. No exhibit 13 was admitted.

Exhibit 14. Diagram and text marked "Project Components" (sic) and marked as Ex. 14.

Exhibit 15. Table entitled "Sample List - Oversizing of CIP Projects for 6-year Growth Increment" and marked as Ex. 15 with the following modification: the first entry in the Column marked "Limit" is changed to read "Cooper Point Road to Yauger Way".

After consideration of the testimony and exhibits described above, the Hearing Examiner makes the following findings of fact, conclusions of law, and decision.

FINDINGS OF FACT

I. General Findings

1. On July 31, 1998, Drebick Investments (Drebick) submitted an application for land use approval for a new office building to be constructed at 2425 Bristol Court in Olympia. No contention is raised that the application was incomplete in any way. Land use approval is the principal regulatory approval which the proposal was required to obtain under City zoning and land use regulations.

2. The proposed office building is located in the Evergreen Park PUD zoning district and has four stories. The record indicates its square footage is 54,698.

3. Land use approval was initially granted by the City on December 14, 1998. Revised land use approvals were issued on January 5, 1999 and February 23, 1999.

4. On January 27, 1999, Drebick submitted a complete application for a building permit for this project. The building permit was issued on May 20, 1999. At the time of the hearing on this matter, construction of the building was nearing completion.

5. Through Olympia Municipal Code (OMC) Chapters 15.06, 15.10, 15.14 and 15.18, the City imposes transportation impact fees on proposals such as this. The land use approvals for this project contained a condition requiring the payment of these transportation impact fees. The land use approvals estimated that the impact fee for this proposal would be $125,500. The later decision of the Director of the Community Planning and Development Department here on appeal found that the transportation impact fee for this building would be $161,359.10. (Ex. 1, Att. I). However, the staff report for this appeal indicates that the City subsequently accepted a transportation impact fee payment of $132,328.98 from Drebick for this project. (Ex. 1, p. 7).

6. Olympia's transportation impact fees are imposed under the authority of RCW 82.02.050 et seq. According to RCW 82.02.060, local ordinances which assess impact fees

> "(4) Shall allow the county, city, or town imposing the impact fees to adjust the standard impact fee at the time the fee is imposed to consider unusual circumstances in specific cases to ensure that impact fees are imposed fairly;
>
> (5) Shall include a provision for calculating the amount of the fee to be imposed on a particular development that permits consideration of studies and data submitted by the developer to adjust the amount of the fee . . ."

7. Olympia has complied with this requirement through the adoption of OMC 15.10.020. Subsection A of that section authorizes the Community Planning and Development Department, sua sponte, to conduct an independent fee calculation if, in the Director's judgment, "none of the fee categories or fee amounts set forth in [the ordinance] accurately describes or captures the impacts of a new development on transportation . . ." Subsections B, C and D allow a feepayer to submit an independent fee calculation to the Director. The Director may then "adjust the impact fees on a case-by-case basis based on the independent fee calculation, the specific characteristics of the development, and/or principles of fairness." These standards are discussed in more detail in the Conclusions of Law, below.

8. Pursuant to OMC 15.10.020, Drebick requested an independent fee calculation for this proposal by letter dated February 25, 1999, found at Ex. 1, Att. G. This request proposed three different methods of calculating transportation impact fees for this project. First, it proposed multiplying $966.00, representing the average cost of new afternoon peak hour trips, by 81, representing the number of new afternoon

peak hour trips generated by the project, for a total fee of $78,246.00. Second, it proposed a fee of zero, arguing that the definitions of the Olympia ordinance precluded impact fees for transportation facilities. Third, it proposed a transportation impact fee of $29,638.00 for this project; based on the traffic impact fee calculation prepared by Perry Shea of SCA Engineering, dated February 26, 1999, and found at Ex. 1, Att. H. This last calculation is occasionally referred to in the record as Shea-1.

9. Mr. Drebick's claim that the Olympia ordinance does not authorize any impact fees for transportation facilities is based on the fact that its definition of "public facilities" codified at OMC 15.06.020 CC does not include streets or roads. However, Ex. 1, Att. L contains a certified copy of Ordinance 5508, which adopted the provisions of OMC Title 15 authorizing the collection of transportation impact fees. That ordinance, in Sec. 2, Part AB, defines public facilities expressly to include "public streets and roads". No evidence was submitted suggesting that this has been amended. Thus, the definition on which Mr. Drebick relies is the result of an error in codification. The codifier has no authority to amend an adopted ordinance. Therefore, the Olympia ordinance does impose transportation impact fees. For this reason, Mr. Drebick's proposed fee of zero is rejected. At the hearing, Mr. Drebick testified that the remedy he is requesting is the transportation impact fee of $29,638.00, as set forth in Shea-1. Thus, Mr. Drebick's alternative request for a fee of $78,246.00 is deemed abandoned.

10. By letter dated May 7, 1999, the Director of the Community Planning and Development Department denied Drebick's request for an independent fee calculation. See Ex. 1, Att. I. The Director found that the request used an improper basis for determining the number of trips which the project would generate and improperly spread the cost of traffic improvements over all, traffic that would use the traffic

improvement, and not the increase in traffic which made the improvement necessary. The Director also found that Drebick had not submitted any information showing that the proposed office is of a unique character or has a mix of uses which justifies an independent fee calculation. The Director concluded that the "feepayer's methodology fails to meet the accuracy and reliability criteria set forth at OMC 15.10.020 (D), and cannot be accepted."

11. On May 21, 1999, Drebick filed a timely appeal of the Director's decision to the Hearing Examiner, as authorized by OMC 15.10.080.

II. The City's general method of calculating impact fees and its application to the Drebick proposal.

12. Effective April 17, 1995, the City adopted Ordinance No. 5508, which added new chapters to Title 15 of the OMC imposing impact fees under the authority of RCW 82.02.050 et seq. This ordinance also incorporated the Transportation Impact Fee Rate Study prepared for the City by JHK Associates and dated March 29, 1995. This study is found at Ex. 1, Att. A in this record.

13. Effective March 15, 1999, the City amended OMC 15.06.020 and 15.18.010 relating to transportation impact fees. This amendment repealed the incorporation of the 1995 Transportation Impact Fee Rate Study and incorporated instead the Transportation Impact Fee Rate Study City of Olympia Addendum, dated February 25, 1999.

14. Drebick submitted a complete application for land use approval on July 31, 1998. Drebick submitted a complete application for a building permit for this project on January 27, 1999. Mr. Drebick testified that he received a vesting notice from the City that its application for a building permit was complete as of January 27, 1999. As held in Part III of the Conclusions, below, the Drebick proposal should be considered

under Ordinance No. 5508 and the incorporated Transportation Impact Fee Rate Study of March 29, 1995.

15. The calculation of impact fees under the 1995 Ordinance and Study proceeds through a number of steps. First, the City identified those transportation improvement projects in its Capital Facilities Plan (CFP) which were needed during the six-year period from 1994 to 2000 to meet adopted level of service (LOS) standards. These improvements are referred to as "capacity improvements" in the 1995 Ordinance and Study and consist of ten project groups. Not all of the ten project groups, however, are included in the impact fee program. See Ex. 1, Att. A, p. 10. All references to "project groups" or "project improvement groups" in this decision are to those project groups included in the impact fee program. The total cost of these project improvement groups was estimated in the 1995 Study to be $18,856,770.

16. The 1995 Study then eliminated from this list those projects which were needed to remedy existing deficiencies in the City's transportation system. The eliminated projects were those on facilities with an existing LOS which was below the City's adopted standard. The resulting list, therefore, included those improvements needed to meet the demands of new growth during the six-year period from 1994 to 2000. The total cost of these improvements was estimated in the 1995 Study at $17,988,000.

17. The 1995 Study then subtracted from this $17,988,000 figure $7,370,000 which was projected to be available from various grants and $1,075,000 which was projected from other City funds, which resulted in a figure of $9,543,000.

18. This figure of $9,543,000 was then further reduced by the expected amount of traffic with both a point of origin and destination outside of the Olympia Urban Growth Area

(UGA).[1] This class of trips is referred to in the record as "pass-through traffic". The 1995 Study accomplished this reduction by estimating the percentage of trips traveling through each project group which would have one or both trip ends in the UGA. These percentages are shown in Ex. 1, Att. 1, Table 2. The overall percentage of 96.2 was then applied to the figure of 9,543,000 for a product of $9,178,932.

19. This figure of $9,178,932 represents the estimated cost of the transportation improvement projects in the UGA needed to provide capacity for new growth over the applicable six-year period, after subtracting the cost of improvements to address existing deficiencies, the percentage of traffic representing pass-through traffic, and funds expected from grants and various other sources. This figure was developed consistently with legal standards and customary practice. It is a reasonable projection of the described costs.

20. The City of Olympia has developed a computer model to predict the pattern and volumes of traffic in the future. In the model, the City is divided into 450 to 500 traffic analysis zones (TAZ). For each such zone, the model considers the Comprehensive Plan designation and the expected population, the number of employees and the number of residential units over a 20 year period. From this, the model is able to estimate the number and timing of trips entering and leaving each TAZ.

21. The model uses 1998 as its base year and assumes that during the following six years the existing and committed transportation network will be present. This represents all transportation facilities which exist or which have funding guaranteed to build them within this six-year period.

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[1] Unless otherwise noted, all references to the UGA include both the incorporated area of the City of Olympia and the unincorporated area designated as part of the Olympia UGA under RCW 36.70A.110.

22. The model then projects the number and distribution of trips among the various TAZ's by assuming that drivers will take the shortest trip to a destination. Thus, as traffic conditions deteriorate on certain streets or improve on others, the model will redistribute trips to assure the shortest trip among the TAZ's.

23. The model does not predict the volume and distribution of traffic from specific developments. Rather, it predicts the changing routes and volumes of traffic among the TAZ's. Stated another way, it distributes trip ends and routes among the TAZ's.

24. In the calculation of impact fees under Olympia's ordinance, the model is used to project the amount of "pass-through" traffic eliminated from consideration as described in Finding 18 and to project the number of new trips generated overall in the UGA during the applicable six-year period.

25. The figure of $9,178,932, described in Findings 15 through 19, was divided by the total number of new, afternoon peak-hour trips projected in the UGA during the six-year period from 1994 to 2000. This resulted in the conclusion that the average, UGA-wide cost of a new trip was $966. These calculation are schematically shown on Ex. 1, Att. 1, Figure 6.

26. This average, UGA-wide cost of a new trip was then convened to the impact fee rate schedule found at Ex. 1, Att. 1, Table 5 through a number of additional steps. First, the City's method used in this case takes trip generation rates for different types of land uses from the Institute of Transportation Engineers (ITE) Trip Generation Manual, 5th Edition. These rates are expressed as the number of vehicle trips entering or leaving a property during the afternoon peak hour. For commercial-administrative office buildings, these rates are listed under the "Basic Rate" column in Ex. 1, Att. 1, Table 3 in terms of vehicle trips per 1000 square feet of gross floor area.

27. Next, these trip rates are reduced to eliminate "pass-by" trips, trips which are already passing by the property and which turn in to use it. "Pass-by" trips, in other words, are not caused or generated by the development for which impact fees are being calculated. Therefore, they should not be counted in the calculation of these fees. The reduction of the trip generation rate to account for "pass-by" traffic is accomplished through application of the "New trips %" shown in Ex. 1, Att. 1, Table 3.

28. Finally, the trip generation rates are adjusted to account for the varying trip lengths generated by different land uses. The average trip length for the UGA was estimated at 3 miles. The City's method then uses limited national survey results to estimate trip lengths for different types of land uses. For each type of land use, the estimated trip length was divided by the average length of 3 miles to derive the "trip length adjustment factor" shown in Ex. 1, Att. 1, Table 3. Each trip generation rate, after elimination of "pass-by" traffic, was multiplied by this factor to account for varying trip length.

29. The resulting trip rates for the various land use types, adjusted for trip length and "pass-by" traffic, were multiplied by $966, the average cost of a new trip in the UGA as explained above. This resulted in the total cost of the transportation improvement projects in the UGA needed to provide capacity for new growth over the applicable six-year period attributable to each land use type per the unit of measurement used. As noted, the unit of measurement for commercial-administrative office buildings is 1000 square feet of gross floor area. Thus, the resulting figure was divided by 1000 to obtain the cost per square foot of gross floor area. This is the impact fee rate adopted by the City in Ex. 1, Att. 1, Table 5 for various sizes of commercial-administrative office buildings.

30. Under this process, the impact fee rate for commercial administrative office buildings with 50,000 to

99,999 square feet of gross floor area is $2.95 per square foot. See Ex. 1, Att. 1, Table 5. After the subtraction of certain credits which are not here at issue, this resulted in the impact fee of $132,328.98 which the City imposed on the Drebick development.

31. In general, the transportation impact fees assessed through this method pay for about one-half of the facilities needed to accommodate new growth.

32. The heart of the City's method of calculating and assessing transportation impact fees may be summarized in four steps:

> (a) Project the cost of the transportation improvement projects in the UGA needed to provide capacity for new growth over the six-year period from 1994 to 2000. This estimate does not include the cost of improvements to address existing deficiencies and has been reduced to account for the percentage of pass-through traffic and funds expected from grants and various other sources.
>
> (b) Project the total number of new, afternoon peak-hour trips with at least one end in the UGA during the same six-year period.
>
> (c) Divide the projected cost from (a) by the projected number of trips in (b) for the average cost of a new trip in the UGA over the six-year period.
>
> (d) Convert this average cost into impact fees for specific types and sizes of development by considering the number of vehicle trips entering or leaving the land use at issue during the afternoon peak hour, the varying trip lengths generated by different land uses, and the percentage of "pass-by" trips.

33. Mr. Samdahl, the City's traffic consultant, testified that in his opinion the use of a jurisdiction-wide average cost as the basis for the impact fee rates was justified, because the City's relatively compact geography matched closely with the average trip lengths, such that in most cases an average trip would traverse a good portion of the City boundaries.

34. Under the method used by Olympia to calculate transportation impact fees, the impact fee assessed a specific development is proportionate to and reasonably related to the jurisdiction-wide need for new transportation improvements created by that development.

35. Every land use benefits in a general sense from a smoothly functioning transportation system with adequate capacity in the jurisdiction in which it is located. Under Olympia's method the transportation impact fee assessed a specific development is used for improvements that will reasonably benefit that development, if benefit is judged by the effect of the transportation improvements in the jurisdiction as a whole.

36. Under Olympia's method, a transportation impact fee does not depend on or vary with the location within the City of the development charged. The fee does not depend on or take into account whether the development charged actually contributes any trips to any of the project groups on which the fee is based.

37. Under Olympia's method, a transportation impact fee assessed a specific development may be based on the cost of projects to which that development will contribute no traffic and which will not directly benefit that development. Under Olympia's method, a development contributing no traffic to any of the project groups on which the transportation impact fees are based would be charged the same impact fee as the same type and size development which did contribute traffic to those project groups.

38. The independent fee calculation proposed by Mr. Drebick, along with the City's criticisms of its method, are discussed in detail in the Findings below. Even if each of the City's criticisms is accepted, the independent fee calculation shows that the Drebick proposal will contribute a minuscule amount of traffic to some of the projects funded by impact fees, such as Fones Road and the intersection of Sleater-Kinney and Martin Way, and a large amount to others, such as the intersection of Cooper Point Road and Evergreen Park Drive. See Ex. 10, Tab 5, Column B1. Under the City's method, Drebick is assessed the same transportation impact fee as a similar development which contributed no traffic to the intersection of Cooper Point Road and Evergreen Park Drive and large amounts to Fones Road and the intersection of Sleater-Kinney and Martin Way.

39. Under Olympia's method, the transportation impact fee assessed the Drebick proposal is not proportionate to or reasonably related to the service demands or needs created by the Drebick proposal on each of the individual project groups on which the impact fees are based.

40. The only manner in which the Drebick proposal could be benefitted by specific transportation improvement projects it will not use, considered individually, is if those improvements relieved traffic pressure on other links used by the Drebick proposal or if they improved emergency response to the Drebick proposal. No evidence was submitted showing this for any of the individual improvements. Under Olympia's method, the transportation impact fees assessed the Drebick proposal may be used for individual transportation facilities which do not reasonably benefit the Drebick proposal.

41. The Drebick proposal is not unique or unusual in its location or as a traffic generator, especially in contrast to other projects for which Olympia has accepted an independent fee calculation. There are no specific characteristics of the Drebick

proposal which suggest the transportation impact fees proposed by Olympia should be adjusted. Finding No. 6 of the Director's decision. Ex. 1, Att. I, states that the information submitted does not show that the Drebick proposal is of a unique character or has a mix of uses which justifies an independent fee calculation. This finding is supported by substantial evidence in the record.

III. The method of calculating impact fees proposed in Drebick's independent fee calculation.

42. As noted, the independent fee calculation proposed by Mr. Drebick is found at Ex. 1, Att. H. This independent fee calculation began by projecting the number of trips which the Drebick project would contribute to the various project groups on which the Drebick impact fees are based. This was done by identifying the TAZ in which the Drebick project is located, TAZ 228, and examining the routes which the City's traffic model predicts the trips into and out of that TAZ will take. The independent fee calculation first determined the total number of afternoon peak hour trips either to or from TAZ 228. It then determined the number of trips either to or from TAZ 228 which would cross each of the project group improvements. It then calculated the percentage of the total traffic into or out of TAZ 228 represented by trips that would cross each project group. Assuming that this percentage would be constant for each traffic generator within TAZ 228, the independent fee calculation applied the percentage generated for each project group to the 81[2] afternoon peak hour trips generated by the Drebick proposal. See Testimony of Perry Shea, May 15, 2000, pp. 134-35. This resulted in the projected number of Drebick trips on each project group link, as shown in Column B of the independent fee calculation table in Ex. 4, Tab 5. The calculation did not use the results of a survey of actual drivers in making this projection.

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[2] The proper number should be 98, as discussed below.

43. The independent fee calculation then determined the total 2004 traffic on each project group link, assuming completion of the existing and committed network, and calculated the percentage of that total traffic on each project group link represented by the projected number of Drebick trips on that link. See Ex. 4, Tab 5 and Ex. 10, Tab 9. That percentage was then applied to the cost of each project group derived from Ex. 1, Att. 1, for Drebick's proposed share of the costs of each project group. These individual shares were added to reach Drebick's total proposed impact fee.

44. The independent fee calculation takes varying trip lengths into account through its projection of the number of Drebick trips which would reach each project group.

45. The City staff objects to this calculation for a number of reasons. First, they state that the number of afternoon peak hour trips generated by the Drebick proposal should be 98, not 81. For the reasons set out in Part IV of the Findings, below, the City staff is correct in that assertion.

46. The staff objects that this calculation improperly distributes the cost of capacity improvements over all traffic using the improvement after its completion, and not just the new trips which made the capacity improvement necessary. This issue is addressed in detail in Part V of the Findings and Part IV of the Conclusions, below.

47. The staff also points out that the rounding in which the independent calculation engages may disguise some impact. However, Mr. Stamm of the City testified that he did not believe that any of the projections of Drebick trips on specific links in the independent fee calculation were lower than they should be due to rounding.

48. The City staff also testified that the independent fee calculation understated the number of trips, both from the Drebick project and in total, that would affect capacity projects

which involve road widening. Mr. Smith of the City staff testified that traffic crossing a roadway also affects the potential need for widening that roadway and thus should be counted in assessing the effect of traffic from a specific project. The independent fee calculation did not do this.

49. The staff disagreed with the projection of total 1998 traffic in the independent fee calculation found in Column C of Ex. 1, Att. H. Mr. Smith testified that the projection of 1998 traffic should be based on transportation facilities actually in place. The projection of 1998 traffic in the independent fee calculation assumed the improvements committed to be built within the following six years were also in place in 1998.

50. Finally, the staff testified that the independent fee calculation should use the total project cost of the various improvements from the 1999 impact fee update ordinance, instead of the older cost numbers which it used. This change would increase the total cost of all the improvements from $31,233,102 to $32,487,100, as shown in Columns G and G1 in Ex. 10, Tab 5.

IV. Calculation of the number of trips generated by this proposal.

51. The Institute of Transportation Engineers publishes a manual for use in projecting the number of vehicle trips which will be generated by different types and sizes of land uses. This manual is regularly used by cities and counties throughout the country for this purpose. The ITE manual has been published in different editions. The 5th Edition, Ex. 6, was published in 1991. The 6th Edition, Ex. 7, was published in 1997.

52. The City uses the ITE Trip Generation Manual to calculate the number of trips generated by a various land uses in the calculation of impact fees.

53. For purposes of this decision, a trip is a single direction vehicle movement with either the origin or destination at the development in question.

54. The 5th Edition of the ITE Manual was the basis for the trip generation rates found in the Transportation Impact Fee Rate Study prepared for the City by JHK Associates dated March 29, 1995. As described in Finding 12, this Study was incorporated into Ordinance No. 5508, effective April 17, 1995, which adopted the impact fee provisions of OMC Title 15. The City subsequently adopted a new impact fee schedule based on the trip generation projections of the 6th Edition. This newer impact fee schedule was adopted after Mr. Drebick filed an application both for land use approval and for a building permit for the project under consideration.

55. The transportation impact fees imposed on the Drebick project by the City are based on the 5th Edition of the ITE Manual.

56. The Traffic Impact Analysis (TIA) for this project was prepared in June 1998 and is found at Ex. 1, Att. B. The TIA was based on the 6th Edition of the ITE Manual. The City accepted the TIA and its use of the 6th Edition for "general transportation impact analysis for SEPA purposes". Ex. 1, p. 9. SEPA is the State Environmental Policy Act, Chap. 43.21C RCW. Mr. Drebick takes the position that the transportation impact fees here at issue should also be based on the 6th Edition.

57. Using the 6th Edition, the TIA projected an afternoon peak hour rate of 1.49 trips per 1000 square feet of general office building. This is an average rate for office buildings of all sizes. At this rate, the Drebick proposal would generate 81 afternoon peak hour trips.

58. Using the 5th Edition, the City staff projected an afternoon peak hour rate of 1.80 trips per 1000 square feet for

this size of office building. At this rate, the Drebick proposal would generate 98 afternoon peak hour trips.

59. The City staff also submitted evidence showing that under the 6th Edition the number of trips generated by a general office building could be calculated in two ways; through the weighted average or the linear regression methods. These methods are explained in detail in the testimony of David Smith of the City staff on June 13, 2000. Mr. Smith testified that using the weighted average method, an office building of the size here proposed would generate 81 afternoon peak hour trips, while under the linear regression method, it would generate 133 such trips. Mr. Smith testified that although the City used the weighted average method to project the number of trips under the 6th Edition for, SEPA purposes, the City would use the linear regression method for impact fee purposes.

60. The Institute of Transportation Engineers also publishes a "Trip Generation Handbook", which is a guide to use of the Trip Generation Manual. Chapter 3 of the Handbook relating to the 6th Edition of the Manual is found at Ex. 10, Tab 12. Beginning at p. 9 of this Handbook is a Series of eight steps to be used to determine how best to estimate trip generation using the Manual. Step 8 lists a number of features of the data collected for a project which indicate that the linear regression method should be used instead of the weighted average. These criteria suggest that the linear regression method should be used for the Drebick project.

61. As held in Part III of the Conclusions below, the City's use of the 5th Edition of the ITE Manual for calculating impact fees for the Drebick proposal was proper. Therefore, it is not necessary to decide between use of the linear regression or weighted average methods of the 6th Edition. The evidence was unquestioned that under the 5th Edition this project would generate 98 afternoon peak hour trips. For purposes of

calculating impact fees under RCW 82.02.050 et seq., the City's use of that figure was proper.

V. <u>The time period over which project costs are distributed</u>.

62. By their nature most traffic improvements cannot be built in segments. No service or capacity is afforded by part of a traffic light or one-half of a lane. The design life of the transportation improvements here at issue is expected to be about 20 years.

63. Because of this, the transportation improvements funded by impact fees will typically provide capacity for more than the six-year period in which they are assessed. That is, they will serve and benefit traffic generated more than six years after the end of the six-year capital facilities period in which they are assessed. They will also serve and benefit traffic in existence on the date their construction is completed.

64. The transportation improvements funded by impact fees do not include projects which were needed to remedy existing deficiencies in the City's transportation system. These are projects on facilities with an existing LOS which was below the City's adopted standard. Instead, the transportation improvements funded by impact fees are those necessary to meet or maintain the adopted LOS due to the growth in traffic which is projected to occur during the applicable six-year period. Thus, the transportation improvements funded by impact fees are made necessary due to the growth in traffic during the six-year period.

65. As summarized in Finding 32, above, the transportation impact fees assessed by Olympia are based on the average cost of a new trip in the UGA over the applicable six-year period. This average is derived by dividing the number of new, afternoon peak-hour trips during the six-year period into the cost of the transportation improvement projects in the

UGA needed to provide capacity for new growth over the same six-year period. Thus, this method distributes the cost of these improvements over the new trips generated during the six-year period. It does not distribute the cost over all the trips which are projected to use the improvements at the end of the period or over the capacity of the improvement at the end of the period. Nor does it distribute the costs over the trips which are projected to use the improvements during or at the end of their useful life. If either of these alternative methods were used, the average cost of a new trip and the resulting impact fee rate would be significantly lower.

66. The effect of the method used by Olympia is that developments approved during a particular six-year period will be assessed impact fees to fund projects which will provide capacity for growth which will occur beyond that six-year period. However, because the transportation impact fees assessed through this method pay for about one-half of the facilities needed to accommodate new growth, see Finding 31, this does not necessarily mean that developments approved during a particular six-year period will in fact finance capacity for growth which occurs beyond that period.

67. Under Olympia's method, a proponent who is assessed impact fees to provide capacity for growth which will occur beyond that six-year period may also benefit from excess capacity funded by development approved before his. The Drebick proposal benefits to an undetermined degree from such excess capacity funded in part by previous developments. The Drebick proposal will also benefit to an undetermined degree from excess capacity funded by those paying impact fees in subsequent six-year periods.

68. The independent fee calculation proposed by Mr. Drebick divided the projected number of Drebick trips on each project group link by the total traffic on that link at the end of the six-year period. See Ex. 4, Tab 5 and Ex. 10, Tab 9. The

resulting percentage was then applied to the total project cost of that link to derive the proposed impact fee for the Drebick proposal for that link. See Ex. 4, Tab 5. The proposed fees for each link were added to obtain the total proposed transportation impact fee for the Drebick development.

69. The effect of the method proposed by Mr. Drebick is to distribute the cost of providing the capacity improvements made necessary due to the growth in traffic during a six-year period over all traffic using the improvement at the end of the six-year period.

LEGAL ANALYSIS AND CONCLUSIONS OF LAW[3]

I. The standard of review.

The impact fees at issue in this appeal were imposed under the authority of RCW 82.02.050 et seq. As noted, each local ordinance imposing these fees

> "(4) Shall allow the county, city, or town imposing the impact fees to adjust the standard impact fee at the time the fee is imposed to consider unusual circumstances in unusual cases to insure that impact fees are imposed fairly; [and]
>
> (5) Shall include a provision for calculating the amount of the fee to be imposed on a particular development that permits consideration of studies and data submitted by the developer to adjust the amount of the fee . . ."

RCW 82.02.060 (4) and (5).

The City of Olympia has implemented these requirements through the adoption of OMC 15.10.020, which allows an

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[3] Due to the complexity of some of the legal issues raised, the conclusions of law are expressed in opinion form, rather than as numbered conclusions.

individual assessed an impact fee to submit an independent fee calculation to the Director of the Community Planning and Development Department. The fees imposed by the impact fee schedule are presumed valid. The Director, however, in response to an independent fee calculation,

> "is authorized to adjust the impact fees on a case-by-case basis based on the independent fee calculation, the specific characteristics of the development, and/or principles of fairness."

OMC 15.10.020 D.

The Director's decision on the independent fee calculation may be appealed to the Hearing Examiner. The Hearing Examiner may

> "so long as such action is in conformance with the provisions of this title, reverse or affirm, in whole or in part, or may modify the determinations of the Director with respect to the amount of the impact fees imposed or the credit awarded upon a determination that it is proper to do so based on principles of fairness and may make such order, requirements, decision or determination as ought to be made, and to that end shall have the powers which have granted to the Director by this title."

OMC 15.06.080 H.

This appeal to the Hearing Examiner is governed by standards of review which could conflict with each other. On one hand, the appeal is conducted as an open-record hearing in which the Examiner may admit and consider evidence which was not before the Director in making the decision on appeal. The Examiner is expressly authorized to make findings of fact on "the applicability of the impact fees to a given development activity, the availability or amount of the credit, or the

accuracy or applicability of an independent fee calculation." OMC 15.06.080 G.

On the other hand, this appeal is subject to OMC 18.75.040 F, which states that

> "the Examiner shall accord due deference to the expertise and experience of the staff rendering such decision. The Examiner shall only grant the relief requested by an Appellant upon finding that the Appellant has established that:
>
> 1. the staff engaged in unlawful procedures or failed to follow a prescribed procedure;
>
> 2. the staff's decision was an erroneous interpretation of the law;
>
> 3. the decision is not supported by substantial evidence within the context of the whole record;
>
> 4. the decision is a clearly erroneous application of the law to the facts;
>
> 5. the decision is outside the authority or jurisdiction of the decision-maker;
>
> 6. the decision violates the constitutional rights of the party seeking relief; or
>
> 7. the decision is clearly in conflict with the City's adopted plans, policies or ordinances."

These standards are almost identical to those contained in the Land Use Petition Act (LUPA), Chap. 36.70C RCW, for the record review of certain local decisions. In fact, the substantial evidence standard adopted for the review of factual matters is identical to the standard applied by Superior Court, in reviewing administrative decisions under LUPA or a writ of certiorari and by appellate courts in reviewing the factual findings of Superior Court. The potential difficulty in applying

these standards lies in the requirement to make findings of fact on the basis of all the evidence, while determining whether the factual aspects of the Director's decision are supported by substantial evidence in the record.

In interpreting a statute or ordinance, all provisions should be harmonized and given effect. See State v. Thorne, 129 Wn.2d 736, 921 P.2d 514 (1996). The standards of review noted above may be harmonized in. the following manner. Evidence not submitted to the Director may be admitted at the appeal hearing as long as it meets the standards of admissibility customarily applied in hearing examiner hearings; that is, it must be the sort of evidence a reasonable person would deem probative of the matter and it cannot be privileged. The evidence before the Examiner at the appeal hearing consists of all exhibits admitted and all testimony to which an objection was not sustained. The City has the responsibility of insuring that the evidence on which the Director relied in making his decision is included in the record before the Examiner.

All factual findings and determinations embodied in the Director's decision are judged under the substantial evidence standard. That is, the Examiner must uphold them if there is substantial evidence in the record to support them. Substantial evidence is evidence which would convince an unprejudiced thinking mind of the truth of the declared premise. Bjarnson v. Kitsap County, 78 Wn. App. 840, 844-45, 899 P.2d 1290 (1995). In applying this standard to the factual determinations of the Director, the Examiner may consider all evidence admitted at the hearing. In making any factual determinations other than those embodied in the Director's decision, the Examiner may make those findings which he believes are best supported by the evidence as a whole.

In this manner the substantial evidence standard is applied to the Director's factual determinations, while the ability of the Examiner to make factual findings in the customary manner on

other matters is preserved. Any legal conclusions by the Examiner are governed directly by OMC 1[illegible]5.040 F. The ultimate decision on the appeal depends on whether any of the standards listed in OMC 18.75.040 F have been satisfied. The burden is on the Appellant to show that at least one of those standards has been met. In all matters of fact, the burden of proof is on the Appellant. The Examiner may decide issues of law de novo, but must accord due deference to the expertise and experience of the staff in making any legal determinations. See OMC 18.75.040 F.

A separate question concerns the nature of the substantive standards which a Hearing Examiner should apply in determining whether the Director's rejection of an independent fee calculation was correct. RCW 82.02.060 (4), cited above, is clear that an independent fee calculation is designed to consider "unusual circumstances in unusual cases to insure that impact fees are. imposed fairly". OMC 15.10.020 D., however, allows the Director to adjust a fee on the basis of "the specific characteristics of the development, and/or principles of fairness." The City, thus, has chosen to implement RCW 82.02.060 (4) by imposing two distinct standards on the Director's decision. The fee may be adjusted on the basis of specific unusual characteristics of the development, or on principles of fairness.

Finding 41 upholds the Director's finding that there are no specific characteristics of the Drebick development which would warrant an adjustment in the impact fees imposed by Olympia's ordinance. Thus, this appeal will turn on the Director's implicit determination that the fees imposed by the City on the Drebick proposal are consistent with principles of fairness.

The notion of fairness has been both a compelling and vexing focus of dispute since Socrates walked in the Athenian sun. Fortunately, the statute authorizing impact fees signals

clearly what the legislature saw as principles of fairness in their application. According to RCW 82.02.050 (3), impact fees

> "(a) Shall only be imposed for system improvements that are reasonably related to the new development:
>
> (b) Shall not exceed a proportionate share of the costs of system improvements that are reasonably related to the new development; and
>
> (c) Shall be used for system improvements that will reasonably benefit the new development."

"Proportionate share" in turn, is defined as "that portion of the cost of public facility improvements that are reasonably related to the service demands and needs of new development." RCW 82.02.090 (5).

These are the standards which should be applied in determining whether the fees imposed by the City on the Drebick proposal are consistent with principles of fairness. Because they involve the application of law to fact, the clearly erroneous standard from OMC 18.75.040 F.4 governs the Examiner's review of the Director's application of these standards. If the fees imposed by the City meet these standards, the inquiry is over. The Examiner does not have authority to reject a fee which meets these statutory standards of fairness, simply because another method of calculation might more closely relate fees imposed on a development to each individual project funded by the fees.

A decision that the fees imposed on the Drebick proposal do not meet the standards of relationship, proportionality and benefit found in RCW 82.02.050 (3) could effectively call the entire Olympia impact fee ordinance into question on those grounds. A Hearing Examiner lacks the authority to invalidate an ordinance. The Hearing Examiner, though, is under a duty in this situation to decide Mr. Drebick's appeal of the Director's

denial of his independent fee calculation. As just discussed, the decision of that appeal demands the inquiry into whether the standards of RCW 82.02.050 (3) are met by the impact fees imposed on the Drebick proposal. I am under a duty to make that determination. If my decision should go against the Director's position, he is free to appeal that decision to Superior Court, which is the proper forum for determining the facial invalidity of any ordinance.

II. The issues of reasonable relationship, proportionality and benefit.

A. The issues as presented by the Findings of Fact.

As shown in Part II of the Findings, the Drebick impact fee is ultimately based on the cost of a series of transportation capacity improvements which are made necessary by the new growth of which the Drebick development is a part. As shown in the Findings, the Drebick fee takes into account the number of trips generated by the proposal, the length of those trips, and the amount of "pass-by" traffic which a use of that type is expected to have. Thus, the Drebick fee is proportionate to and reasonably related to the demand for new capacity improvements considered as a whole. As also found, those improvements considered as a whole will benefit the Drebick development. The tailoring of the Drebick fee to the number of trips generated, the length of those trips, and the "pass-by" traffic insures that the fee bears a reasonable relationship to the benefit the Drebick development obtains from these traffic improvements. considered as a whole.

Part II of the Findings also shows that there is no relationship or proportionality between the individual capacity project groups on which the Drebick fee is based and the needs or service demands created by the Drebick proposal. Mr. Drebick is asked to pay a fee which is in part based on the need for capacity projects to which the Drebick proposal will contribute little or no traffic. Stated another way, the Drebick

fee is based on the need for some capacity projects which are not needed to serve Drebick traffic.

On the question of benefit, it is possible that a specific improvement to which Drebick will contribute little or no traffic will nonetheless benefit the Drebick development by relieving traffic pressure on a facility which Drebick traffic will use or by improving emergency access to the Drebick site. However, no evidence was submitted showing this for any specific transportation improvement. Thus, the only way in which the Drebick proposal is benefitted by the improvements it is asked to help fund is in the general benefit it and any other development gains from a better road and street system.

On the basis of the facts presented, one major legal issue is whether the relationship and proportionality between a transportation impact fee and the service demands created by a proposal assessed the fee is judged by examining the demands of the proposal on each transportation project group funded by that fee or by viewing the demands of the proposal and the improvements funded by the fee a as (sic) whole.

The second issue is whether a proposal assessed a transportation impact fee must be reasonably benefitted by each transportation project group funded by that fee or by all such project groups considered together.

The heart of each issue is whether the projects funded by a transportation impact fee are viewed separately or together in judging whether the requisite relationship is present. These issues may be answered by recourse to the statutes and the case law.

B. RCW 82.02.050 et seq.

As noted, Olympia's transportation impact fees are imposed under the authority of RCW 82.02.050 et seq. Impact fees are defined by RCW 82.02.090 (3) as

> "a payment of money imposed upon development as a condition of development approval to pay for public facilities needed to serve new growth and development, and that is reasonably related to the new development that creates additional demand and need for public facilities, that is a proportionate share of the cost of the public facilities, and that is used for facilities that reasonably benefit the new development. . ."

These requirements are reflected in RCW 82.02.050, the section which authorizes the imposition of impact fees. According to subsection (3) of that section, impact fees:

> (a) Shall only be imposed for system improvements that are reasonably related to the new development;
>
> (b) Shall not exceed a proportionate share of the costs of system improvements that are reasonably related to the new development; and
>
> (c) Shall be used for system improvements that will reasonably benefit the new development.

These are the statutory standards which govern this appeal.

1. <u>The requirements of a reasonable relationship and proportionality</u>.

"Proportionate share" is defined by RCW 82.02.090 (5) as

> "that portion of the cost of public facility improvements that are reasonably related to the service demands and needs of new development."

At the hearing, I invited counsel to address the significance, if any, of the varying use of the terms "the new

development" and "new development" in these and other provisions in the authorizing statutes. On reflection, this distinction is not of great help in resolving these issues. First, the definition of "development activity" in RCW 82.02.090 (1) focuses on specific developments, not new development in general. More to the point, the statute as a whole requires some degree of proportionality between the impact fee imposed on a development and the need for new facilities created by that development. Olympia argues that the required proportionality is between the development type, through the number and length of trips it will generate, and the cost of all the improvements needed to serve new growth in the appropriate six-year period. Drebick argues that the required proportionality is between the development type and each transportation project group on which the fees are based. Each are agreed that the effect of the specific development or development type must be examined. They differ in whether the improvement projects funded must be viewed separately or as a whole in determining proportionality.

Turning first to the text of the statute, the heart of its demands is found in RCW 82.02.050 (3) (a) and (b), which, as noted above, require that impact fees

> "[s]hall only be imposed for system improvements that are reasonably related to the new development [and] [s]hall not exceed a proportionate share of the costs of system improvements that are reasonably related to the new development . . ."

The phrase "reasonably related" is not defined. However, the definition of "proportionate share" from RCW 82.02.090 (5), supra, makes clear that the requisite relationship is between the service demands of the Drebick development and the share of the cost of improvements imposed on Drebick through the impact fee.

The Drebick development will contribute a negligible amount of traffic to some of the improvements on which its fee is based. Thus, there is no reasonable relationship between the service demands of the Drebick development and the costs of some of the system improvements it is required to fund. When a new development lacks a reasonable relationship with some of the system improvements on which its impact fee is based, it is difficult to say that the fee is imposed only for system improvements that are reasonably related to the new development. That, however, is the requirement of RCW 82.02.050 (3) (a). The statutory text indicates that the Drebick fee does not meet the requirements of a reasonable relationship imposed by that section.

Even if this requirement were met, the fee would still be subject to the demand of proportionality from RCW 82.02.050 (3) (b). Olympia argues that this demand is met by basing its fees on the cost of capacity improvements needed to serve all new development and its reliance on the number and length of trips of specific land use types to insure that specific impact fees are proportionate to that cost.

Even if impact fees are deemed taxes, as opposed to regulatory fees, they cannot be arbitrary and capricious and must rest on some rational basis. Oil Heat Institute v. Mukilteo, 81 Wn.2d 7, 11, 498 P.2d 864 (1972). If a tax designed to address the traffic impact of a development were imposed without regard to the traffic impact of that development, it seems likely that it would founder on these general principles. These principles require at least that the impact of a type of development be considered in assessing impact fees. In the area of traffic, this impact inevitably is measured by the number and length of trips generated. Thus, if the proportionality standard of RCW 82.02.050 (3) (b) means only that the City must take the number and length of Drebick trips into account in assessing its impact fee, it would only mirror the otherwise applicable requirements of due process. Likewise, if the requirement of

proportionality means that the City must restrict impact fees to funding those projects made necessary by new development as a whole, it would simply repeat the requirement of RCW 82.02.060 (7) "that impact fees cannot be used to make up for existing system deficiencies.

Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous. City of Seattle v. State, 136 Wn.2d 693, 698, 965 P.2d 619 (1998). If the requirement of proportionality is met by the fees imposed on the Drebick development, that requirement would be superfluous, given the underlying requirements from Oil Heat. Thus, proportionality requires something more than multiplying the number of new trips from a development, adjusted for length and "pass-by" traffic" by the jurisdiction-wide cost of a new trip. That, however, is the method used by Olympia.

An element of the authorizing statutes which supports Olympia's approach is the requirement of RCW 82.02.060 (1) that impact fees be imposed through a schedule of fees for each type of development activity. If fees must be imposed through the method used by Mr. Drebick's consultants, a projection of the number of trips from each development to each system improvement funded, it is difficult to see what role is left for a fee schedule.

On the other hand, the requirement of a schedule does not demand that a development's effect on the individual improvements be ignored. With the detailed information from the City's traffic model giving the number and distribution of trips among the TAZ's, it should be possible to devise a fee schedule using that information which achieves some proportionality between a development and its effect on the various improvements funded. The requirement of proportionality does not mandate that the number of trips be individually calculated between each development charged

impact fees and each system improvement funded by those fees. It does require, though, that a development not be charged impact fees to fund projects on which it has no impact and from which it receives no benefit.

2. The requirement of a reasonable benefit.

RCW 82.02.050 (3) (c) requires that impact fees "[s]hall be used for system improvements that will reasonably benefit the new development." As already found, not all of the individual system improvements on which the Drebick fee is based will benefit the Drebick development. That development, however, will benefit from the general improvement in traffic conditions from these system improvements. The impact fees which Drebick has been assessed will help fund this general improvement from which the Drebick development will benefit. The Olympia staff argues that this general type of benefit satisfies RCW 82.02.050 (3) (c).

The Findings show the Drebick proposal would be benefitted by some, but not all of the improvements its fees would fund. As with the requirement of a reasonable relation discussed above, it is difficult to conclude that the Drebick fees are "used for system improvements that will reasonably benefit the new development", as required by RCW 82.02.050 (3) (c), when some of the improvements which they will fund have no benefit to the Drebick development. Thus, the statutory text itself indicates that the Drebick fee does not meet the requirements of RCW 82.02.050 (3) (c).

A canon of statutory construction leads to the same conclusion. "System improvements" are defined by RCW 82.02.090 (9) as

> "public facilities that are included in the capital facilities plan and are designed to provide service to service areas within the community at large, in contrast to project improvements."

This restricts system improvements to those within the City or its unincorporated UGA. If, the staff argues, system improvements within this area benefit all developments in the City, then the requirement of RCW 82.02.050 (3) (c) is redundant, since system improvements must be located in this area by virtue of their definition in RCW82.02.090 (9). Because of its redundancy, this reading of RCW 82.02.050 (3) (c) should not be followed. See City of Seattle v. State, 136 Wn.2d at 698.

This redundancy may be avoided by reading RCW 82.02.050 (3) (c) to require some showing that the specific developments" funded by impact fees benefit the development paying the fees. As with the requirements of relationship and proportionality discussed above, this does not mandate a separate calculation of the number of trips between each development charged impact fees and each system improvement funded by those fees. It does require, though, that a development not be charged impact fees for projects which will not benefit it.

C. Other statues.

1. RCW 82.02.020.

RCW 82.02.050 et seq. was not the first statute authorizing impact fees in Washington. One of the more important fee statutes in effect at the adoption of RCW 82.02.050 et seq. was RCW 82.02.020. This statute provides in pertinent part that

> "Except as provided in RCW 82.02.050 through 82.02.090, no county, city, town, or other municipal corporation shall impose any tax, fee, or charge, either direct or indirect, on the construction or reconstruction of residential buildings, commercial buildings, industrial buildings, or on any other building or building space or appurtenance thereto,

> or on the development, subdivision, classification, or reclassification of land. However, this section does not preclude dedications of land or easements within the proposed development or plat which the county, city, town, or other municipal corporation can demonstrate are reasonably necessary as a direct result of the proposed development or plat to which the dedication of land or easement is to apply.
>
> This section does not prohibit voluntary agreements with counties, cities, towns, or other municipal corporations that allow a payment in lieu of a dedication of land or to mitigate a direct impact that has been identified as a consequence of a proposed development, subdivision, or plat. . ."

Under this section, a city could impose an impact fee to mitigate a direct impact of a proposal such as Mr. Drebick's through a voluntary agreement. The meaning of "direct impact" was well illustrated in Castle Homes v. Brier, 76 Wn. App. 95, 882 P.2d 1172 (1994). The City imposed fees on developments to fund street improvements by taking the full cost of those improvements needed in a certain quadrant of the City to accommodate new development and dividing that by the number of lots in all the new or pending subdivisions in that quadrant. The result was the fee for each lot. Id. at 97-98. Even though proportionate, the Court struck this down because it did "not take into account the direct impact of each subdivision location and the differing street distribution impacts of each." Id. at 97-98. This result strongly suggests that RCW 82.02.020 requires the sort of individual analysis used by Mr. Drebick, instead of the jurisdiction-wide approach used by Olympia. Accord, Cobb v. Snohomish County, 64 Wn. App. 451, 829 P.2d 169 (1991).

The case law is less clear on the meaning of "voluntary agreement". The Court of Appeals has stated that "voluntary",

in this context, means that the developer has a choice of either paying for reasonably necessary costs which are directly attributable to the project or losing approval. Cobb, 64 Wn. App. at 457-58. However, the state Supreme Court in Henderson Homes v. Bothell, 124 Wn.2d 240, 246, 877 P.2d 176 (1994), indicated that presenting the developer with that sort of "take it or leave it" proposition did not create a voluntary agreement. The Court suggested that there must be some sort of negotiation between the government and the developer over the fee amount or how the fees were to be spent. Id. The opinion in Trimen Development v. King County, 124 Wn.2d 261, 877 P.2d 187 (1994), held an agreement voluntary because the developer had a choice of dedicating land or paying a fee in lieu of dedication. Trimen, 124 Wn.2d at 272. This situation, however, still presented the developer with the choice of paying a fee or losing approval, which the same court in Henderson Homes frowned on.

As noted, a statute should be construed to give its provisions effect and to avoid redundancy. City of Seattle, 136 Wn.2d at 698. Under Mr. Drebick's reading, RCW 82.02.050 et seq. would use the same direct impact standard as RCW 82.02.020. However, both the City's and Mr. Drebick's reading of RCW 82.02.050 et seq. would eliminate the requirement of a voluntary agreement to impose impact fees. Thus, each reading represents a change from the requirements of RCW 82.02.020. Neither reading renders the statute superfluous.

2. SEPA.

Under the State Environmental Policy Act (SEPA), Chap. 43.21C RCW, a governmental entity may subject land use approvals to conditions which 1) are based on formally designated, SEPA polices, 2) mitigate specific environmental impacts of the project which are identified in the documents prepared under SEPA, and 3) are in writing and are reasonable

and capable of being accomplished. RCW 43.21C.060. Environmental impacts are defined as the effects of actions on the elements of the environment. WAC 197-11-752. The elements of the environment include transportation systems, vehicular traffic, and the movement or circulation of people or goods. WAC 197-11-444(2)(c). A SEPA condition may require the payment of money to mitigate an adverse environmental impact. See Prisk v. Poulsbo, 46 Wn. App. 793, 800, 732 P.2d 1013 (1987) and RCW 43.21C.065. Thus, transportation impact fees may be imposed under SEPA.

Mr. Drebick's reading of RCW 82.02.050 et seq. arguably makes it redundant of SEPA, since both require a showing of a direct impact by the development charged on each improvement funded. However, the reading of RCW 82.02.050 et seq. promoted by both the City and Mr. Drebick would dispense with the procedural requirements of SEPA and the requirement of formally designated SEPA polices to impose impact fees. Thus, neither reading makes RCW 82.02.050 et seq. redundant of SEPA.

3. The Local Transportation Act.

In 1988 the legislature adopted the Local Transportation Act (LTA), Chap. 39.92 RCW, which authorized local governments to impose transportation impact fees on new development. The statute defines transportation impact fee as

> "a monetary charge imposed on new development for the purpose of mitigating off-site transportation impacts that are a direct result of the proposed development."

RCW 39.92.020 (6).

> "Direct result of the proposed development", in turn, is defined as

> "those quantifiable transportation impacts that are caused by vehicles or pedestrians whose trip origin or destination is the proposed development."

RCW 39.92.020 (3).

This scrutiny of individual impact is virtually indistinguishable from that proposed in the independent fee calculation by Mr. Drebick. Thus, if the requirement of a direct, individualized impact is viewed in isolation, the interpretation of RCW 82.02.050 et seq. proposed in the independent fee calculation is redundant of the LTA and should not be followed under City of Seattle, supra.

On the other hand, RCW 82.02.050 et seq. authorized several different types of impact fees, including those for transportation, while the LTA authorized only those for transportation improvements. If the legislature desired to adopt the direct impact standard of the LTA for all the impact fees authorized by RCW 82.02.050 et seq., it would have been most rational to gather all the fee types in that single statute, instead of authorizirtg fees for parks, schools and fire protection in the new statute and leaving transportation impact fees in the existing LTA. Thus, the adoption of a single new statute imposing the direct impact standard on all impact fees would not be superfluous.

Perhaps more to the point, the legislature expressly stated in the LTA that its fees are not taxes. RCW 39.92.010. Impact fees under RCW 82.02.050 et seq., however, have been held to be taxes, New Castle Investments v. City of LaCenter, 98

Wn.App. 224, 234 (1999).[4] The Olympia staff characterizes these fees as taxes, not regulatory fees. Thus, even if the LTA and RCW 82.02.050 et seq. were to require the same level of impact, the latter statute still effected a change in the law by classifying the charges as taxes.

None of the interpretations of RCW 82.02.050 et seq. put forth by the parties would make the statute's treatment of transportation impact fees redundant. Thus, the canon condemning interpretations which make statutes superfluous does not require the rejection of either side's interpretations.

D. The case law.

No reported appellate court decisions of this State have decided the issues of relationship, proportionality and benefit posed in this appeal. Two decisions of the Court of Appeals, though, each point to opposite resolutions. A decision of Superior Court for Thurston County squarely supports Olympia's view.

In Castle Homes v. Brier, 76 Wn. App. at 95, the City had imposed transportation impact fees under the same general methodology used here by Olympia. The City calculated the full cost of street improvements needed in a certain quadrant of the City to accommodate new development and divided that cost by the number of lots in all the new or pending subdivisions in that quadrant. New developments then were charged that fee for each lot. Id. at 97-98. This is conceptually indistinguishable from Olympia's method, which calculated of the cost of capacity improvements needed to accommodate new development throughout the City, divided that cost by the total

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[4] The New Castle opinion at one point states that the impact fee ordinance imposes a tax, id. at 234, and at another point that it does not hold that the fees are taxes. Id. 236. The plain import of the opinion, though, is to characterize impact fees under RCW 82.02.050 et seq. as taxes.

number of new trips for the average cost of a new trip, and charged new developments that cost times the number of new trips they generate adjusted for length.

The Court contrasted this Olympia-like method, which it called "proportionate share", with another method denominated "fair share". The latter method "describes the cost to a developer for the traffic impacts directly related to the individual project." Id. at 98, n. 2. The Court then stated that the definition of proportionate share in RCW 82.02.090 (5) "is more closely aligned with 'fair share' as used by the parties, as it requires costs of the improvements as being 'reasonably related' to the new development." Id. at 98, n. 4. Castle Homes dealt with RCW 82.02.020, not RCW 82.02.050 et seq. Therefore, its statements about the latter statute are dictum. Nonetheless, those statements disclose the Court's view that Brier's (and Olympia's) method does not comply with RCW 82.02.050 et seq.

Division II of the Court of Appeals proceeds in the opposite direction. The issue posed in New Castle, supra, was whether transportation impact fees imposed under RCW 82.02.050 et seq. were subject to the vesting statute for subdivisions, RCW 58.17.033. To answer that, the Court asked whether impact fees were "land use control ordinances", as that term is used in RCW 58.17.033. One of its reasons for answering that question in the negative was its conclusion that these impact fees were more in the nature of a tax than a regulatory fee. In reaching that conclusion, the Court examined the three distinctions between taxes and regulatory fees set out in Covell v. City of Seattle, 127 Wn.2d 874, 879, 905 P.2d 324 (1995). The last of these distinctions asks "whether there is a direct relationship between the fee charged and the service received by those who pay the fee or between the fee charged and the burden produced by the fee payer." Covell, 127 Wn.2d at 879.

The Court held that impact fees resemble taxes under this criterion, because

> "there is no direct relationship between the fees charged and the particular development. Although impact fees must be 'reasonably related' to the impact of new development on the public infrastructure, they are not individually calculated for each new development, but rather are based on a general calculation that applies to all new development. . . By the clear language of the statute, GMA impact fees are not intended to compensate local governments for the direct impacts of specific development projects on specific components of local infrastructure systems or to finance programs that regulate development."

New Castle, 98 Wn.App. at 234 and 236.

The clear import of this holding is to uphold the method followed by Olympia in assessing impact fees. The effect of the dictum in Castle Homes would be to invalidate Olympia's method. Thus, the appellate court decisions are split on the central issue presented by this appeal.

In 1999 Olympia's impact fee ordinance was upheld against a challenge in Washington Manufactured Housing Association v. City of Olympia, Thurston County Superior Court No. 96-2-03927-3. In its decision, the Court entered the following Conclusions of Law:

> "2. Olympia's impact fee ordinance complies with RCW 82.02.050 (3) (a) because the City's Impact Fees are used only for System Improvements that are 'reasonably related' to new development. The City is not required to show a direct relationship between construction of Plaintif's new office building and the impact fee.

3. The City's impact fees do not exceed a proportionate share of the costs of system improvements that are reasonably related to new growth and complies with RCW 82.02.050 (3) (b).

4. The City's impact fees are used to fund only the cost of system improvements which reasonably benefit new development in compliance with RCW 82.02.050 (3) (c)."

This decision, however, does not indicate whether the issues presented here of individualized versus area-wide proportionality were argued to the Court. Further, the only transportation improvement discussed in the Findings is the intersection of Cooper Point Road and Evergreen Park Drive. According to the Superior Court decision, at Finding 7, this intersection actually fronts on the development assessed the impact fees at issue. Thus, the development has a direct effect on that improvement, meeting virtually any interpretation of the requirements of relationship and proportionality. These considerations, combined with the split of authority in the appellate courts, suggest that the decision in Manufactured Housing should not be deemed to conclude the issues presented in this appeal.[5]

E. The distinction between taxes and regulatory fees.

As stated above, Division II of the Court of Appeals views impact fees imposed under RCW 82.02.050 et seq. as taxes. New Castle, 98 Wn.App. at 234. This conclusion seems at odds with the decision of Division I in View Ridge Park v. Montlake Terrace, 67 Wn. App. 588, 839 P.2d 343 (1992). In View Ridge Park, the Court held to be a regulatory fee an ordinance

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[5] The decision of the Thurston County Superior Court in Olympia Master Builders v. City of Olympia, No. 92-2-02215-7 (4-28-93) does not reach the issues of relationship, proportionality and benefit presented in this appeal. It does hold impact fees to be taxes.

which required applicants for multiple unit residential developments to construct on-site recreational facilities varying in value according to the number of units or to pay a fee in lieu to develop off-site recreational facilities. This fee, although imposed under RCW 82.02.020, shares its essential regulatory feature with Olympia's impact fees. It imposes a financial burden on a development to mitigate the impacts of that development and varies the amount of the fee with the extent of the impact.

New Castle also seems inconsistent with the analysis followed in Teter v. Clark County, 104 Wn.2d 227, 704 P.2d 1171 (1985) and San Telmo Associates v. Seattle, 108 Wn.2d 20, 735 P.2d 673 (1987). The former case held to be regulatory a stormwater utility fee which, as with Olympia's impact fees, varied with the amount of impact and was used to address that impact. The latter case held that an important badge of taxation is the use of revenues to address a general societal problem, as opposed to a problem directly caused by the activity charged. San Telmo, 108 Wn.2d at 25. The analysis in each of these cases would show impact fees under RCW 82.02.050 et seq. to be regulatory.

In spite of these inconsistencies, the holding in New Castle, a published opinion of the Court of Appeals, must be followed. These impact fees must be deemed taxes. Taxes are not required to have anything to do with the activity taxed. A tax on cigarettes, for example, has been used to fund efforts to improve water quality. The effect of classifying impact fees as taxes is largely one of statutory interpretation: as taxes, a much broader range of relationship and proportionality would be allowed to stand. These impact fees, however, must still meet the relationship, proportionality and benefit requirements of RCW 82.02.050 et seq. For the reasons set out above, they do not. Therefore, even if Olympia's impact fees are deemed taxes, their imposition on the Drebick proposal does not meet the principles of fairness embodied in that statute.

F. Nollan and Dolan.

Mr. Drebick argues that the nexus and rough proportionality requirements of Nollan v. California Coastal Commission and Dolan v. City of Tigard, both supra, apply to impact fees. This decision holds that the impact fees imposed on the Drebick proposal do not meet the relationship and proportionality standards of RCW 82.02.050 et seq. Therefore, it is not necessary to decide whether Nollan and Dolan apply to impact fees.

G. Summary of conclusions pertaining to reasonable relationship, proportionality and benefit.

Under Olympia's method, a transportation impact fee assessed a specific development may be based on the cost of projects to which that development will contribute no traffic and which will not directly benefit that development. Specifically, the Drebick development is charged a fee which is in part based on the need for capacity projects to which the Drebick proposal will contribute little or no traffic; that is, the Drebick fee is based on the need for some capacity projects which are not needed to serve Drebick traffic. This does not meet the requirements of RCW 82.02.050 (3) and 82.02.090 (5) that an impact fee not exceed the portion of the cost of public facility improvements that are reasonably related to the service demands and needs of new development.

In addition, on the evidence presented the transportation impact fees assessed the Drebick proposal may be used for system improvements which do not reasonably benefit that development. This does not meet the requirement of RCW 82.02.050 (3) (c).

The conclusion that the Drebick impact fees do not meet the requirements of RCW 82.02.050 (3) does not mean that the City must project the number of trips between every development assessed an impact fee and every system

improvement funded by those fees. As described in the Findings, the City has developed a computer traffic model which projects trips among the hundreds of TAZ's into which the City is divided. As a "gravity" model, the program adjusts the number and distribution of its trip projections as some links and intersections become less passable with increasing use and some become more passable with facility improvements. The model also allows some projection of trip patterns within a TAZ.

The use of this apparently readily accessible information would allow the City to consider proportionality and benefit at the TAZ level. It would have allowed the City to remove those system improvements having an insignificant relation to the Drebick proposal from the calculation of the Drebick fee. It would allow the cost of other improvements to be included in the calculation of the Drebick fee roughly in proportion to the amount of traffic contributed to them. If used with the Drebick fee, this would have removed all grounds for finding any inconsistency with RCW 82.02.050 (3). Any greater or more precise level of traffic analysis is not required in the assessment of impact fees.

III. Trip generation numbers.

According to OMC 15.06.040 D., "[i]mpact fees shall be assessed at the time the complete building permit or occupancy permit application is submitted for each unit in the development, using the impact fee schedule then in effect." As found above, at the time Mr. Drebick submitted his application for a building permit for this project, the 1995 impact fee schedule based on the 5th Edition of the ITE Manual was in effect. Thus, OMC 15.06.040 D. requires that the transportation impact fees for this project be calculated using the 5th Edition of the ITE Manual.

OMC 15.06.040 D. is a type af vested rights rule. It states that a project will be governed by certain standards in effect

when a building permit application is submitted. Division II of the Court of Appeals, however, has held that RCW 58.17.033, the vested rights statute for subdivisions, does not apply to transportation impact fees. New Castle, 98 Wn. App. at 226. The Court's reliance an the common law vested rights doctrine, including the decision in Lincoln Shilo v. Mukilteo Water District, 45 Wn. App. 123, 724 P.2d 177 (1986), rev. den. 107 Wn.2d 1014, suggests that it would also hold that the doctrine does not apply to impact fees assessed for developments which are not subdivisions. See New Castle, 98 Wn. App. at 231-233.

This holding, though, does not prevent local governments fram adopting their own vesting ordinances which are consistent with the purposes af the vested rights doctrine. See Manor v. Pierce County, 133 Wn.2d 269, 279, 943 P.2d 1378 (1997). OMC 15.06.040 D. vests projects under the impact fee standards in effect when a building permit application is submitted. This early vesting rule is consistent with the approach taken by our courts since the doctrine was developed in State ex rel. Ogden v. Bellevue, 45 Wn.2d 492, 275 P.2d 899 (1954) and Hull v. Hunt, 53 Wn.2d 125, 331 P.2d 856 (1958). It plainly affords the developer certainty and the ability to fix the standards applicable to a project: considerations which have underlain the doctrine since those decisions. See e.g. West Main Assocs. v. City of Bellevue, 106 Wn.2d 47, 51, 720 P.2d 782 (1986).

Our courts have also recognized that

> "development interests protected by the vested rights doctrine come at a cost to the public interest because the practical effect of recognizing a vested right is to sanction the creation of a new nonconforming use. If a vested right is too easily granted, the public interest is subverted."

Noble Manor, 133 Wn.2d at 280; citing Erickson v. McClerran, 123 Wn.2d 864, 873-74, 872 P.2d 1990 (1994).

OMC 15.06.040 D. is a vesting rule which been voluntarily adopted by the City and which is well within the general confines of the common law doctrine followed since Ogden, supra. It can hardly be characterized as harming the public interest by too easily granting a vested right.

OMC 15.06.040 D. is within the City's authority and is consistent with the purposes and policies of the vested rights doctrine in general. Under it, the 5th edition of the ITE Manual must be applied to this proposal.

The City staff's use of the ITE 6th Edition to derive trip generation numbers for SEPA purposes seems inconsistent with its use of the ITE 5th Edition for impact fee purposes. Each analysis views the same project under the same conditions. The Drebick building will not somehow generate less traffic when judged under SEPA than when analyzed for purposes of calculating impact fees. Any difference in the analysis used under SEPA and that used under RCW 82.02.050 et seq. has no effect on the number of trips which a project will generate. That is purely a matter of fact which, absent factual reasons to the contrary, should remain constant in each type of analysis.

As concluded above, the City's use of the ITE 5th Edition in calculating trip generation numbers for impact fee purposes was proper. No SEPA issues are presented for decision in this appeal. Any inconsistency in the use of one edition for SEPA purposes and another for impact fee analysis describes no legal flaw in the City's use of the 5th Edition for impact fee purposes.

The City staff also testified that if it were to use the 6th Edition for this project, it would use the weighted average method to calculate the number of trips for SEPA purposes, but the linear regression method for impact fee purposes under RCW 82.02.050 et seq. Because this decision upholds the City's use of the 5th Edition to calculate impact fees for this

project, it is not necessary to decide which of the differing methods would have been proper under the 6th Edition.

As shown in Ex. 10, Tab 6, the 6th edition of the ITE Manual states that "when buildings are interrelated (defined by shared parking facilities or the ability to easily walk between buildings) or house one tenant, it is suggested that the total area or employment of all the buildings be used for calculating the trip generation." Because this decision upholds the City's use of the 5th Edition, it is not necessary to determine whether the proposed building and other nearby buildings owned by Mr. Drebick are interrelated for purposes of this provision.

IV. <u>The time period over which project costs are distributed</u>.

As set out in Part V. of the Findings, above, the transportation improvements funded by impact fees will typically provide capacity for more than the six-year period in which they are assessed. Olympia's method of assessing impact fees distributes the cost of these improvements over the new trips generated during the applicable six-year period. The effect of this method is that developments approved during a particular six-year period will be assessed impact fees to fund projects which will provide capacity for growth which will occur beyond that six-year period. The legal issue presented is whether this violates RCW 82.02.050 et seq.

Absent an "extraordinary and compelling reason", impact fees must be expended or encumbered within six years of receipt. RCW 82.02.070 (3). As stated in Findings 62 and 63, traffic improvements cannot be built in segments and are expected to have a design life of about 20 years. These constraints, however, do not mean that developments assessed impact fees within a particular six-year period must effectively fund capacity for a longer period. A city or county could distribute the costs of an improvement over all new development approved within its design life through devices

such as latecomer agreements. The question is whether RCW 82.02.050 et seq. requires such a distribution of costs.

Mr. Drebick argues that Olympia's method of fixing impact fees lacks the requisite proportionality, because it requires him to fund transportation capacity beyond that which is necessary to serve his project. To repeat the governing standards, impact fees

> "(a) Shall only be imposed for system improvements that are reasonably related to the new development;
>
> (b) Shall not exceed a proportionate share of the costs of system improvements that are reasonably related to the new development; and
>
> (c) Shall be used for system improvements that will reasonably benefit the new development."

RCW 82.02.050 (3). "Proportionate share" is "that portion of the cost of public facility improvements that are reasonably related to the service demands and needs of new development." RCW 82.02.090 (5).

Olympia bases its transportation impact fees on the average cost of a new trip in the UGA over the applicable six-year period. This average is derived by dividing the number of new, afternoon peak-hour trips during the six-year period into the cost of the transportation improvement projects in the UGA needed to provide capacity for new growth over the same six-year period. See Finding 65. In this calculation the cost of the transportation improvement projects is the numerator. The number of new, afternoon peak-hour trips generated during the six-year period is the denominator. The result is the average cost of a new trip in the UGA over the applicable six-year period.

In calculating the Drebick impact fee, the cost figure in the numerator of this equation is derived from those transportation improvement projects in the CFP which were needed during the six-year period from 1994 to 2000 to meet adopted LOS standards. See Findings 15-16. All projects needed to remedy existing deficiencies in the City's transportation system were eliminated from this calculation. Thus, the cost figure in the numerator included only those improvements needed to meet the demands of new growth during the six-year period from 1994 to 2000. The Drebick proposal is part of that new growth.

The denominator represents the new trips during the six-year period from 1994 to 2000 which made the costs shown in the numerator necessary. The trips generated by the Drebick proposal are part of this figure. Dividing the cost of projects made necessary by new growth in a fixed time period by the new growth in that same period which made those projects necessary results in a share of that cost which is reasonably related to the service demands of new development. That falls squarely within the definition of proportionate share found in RCW 82.02.090 (5).[6] Thus, the Olympia method meets the requirements of RCW 82.02.050 (3).

Any perceived disproportionality in requiring Mr. Drebick to fund capacity beyond that needed in his six-year period is tempered by the effects of the entire system. If Mr. Drebick is required to fund some excess capacity, he is also benefitting from the excess capacity funded by those paying impact fees in the past. Further, his project is benefitted by the fact that

---

[6] The approach proposed by Mr. Drebick would distribute the cost of improvements needed in each six-year period over all the traffic using the improvement at the end of each period. This would violate the requirement of RCW 82.02.090 (5) that the fee be related to the service demands of new development, not all traffic which happens to be using the improvement at the end of the period.

developments approved in subsequent six-year periods will be similarly charged, thus insuring that the Drebick development will be served by an adequate transportation system.

Viewed in its entirety, the Olympia impact fee system is designed to secure an acceptable LOS for its transportation system into the future. The system accomplishes this by distributing the costs of system improvements which are made necessary by new development in each six-year period among that same development in that same time period. All new development subject to impact fees in each six-year period is charged in the same manner. This results in a proportionate impact fee meeting the requirements of RCW 82.02.050 (3).

V. Miscellaneous conclusions.

As described in the Findings, the City's method counts traffic crossing a roadway, as well as traffic on a roadway, in assessing the effect of traffic from a specific project on a roadway link. The Appellant has not met his burden of showing that this violates governing standards.

As described in the Findings, the City's method projected 1998 traffic based on transportation facilities actually in place at that time. The projection of 1998 traffic in the independent fee calculation assumed the improvements committed to be built within the following six years were also in place in 1998. The Appellant has not met his burden of showing that the City's method of projection violates governing standards.

As described in the Findings, the City would calculate the amount of impact fees by using the total project cost of the various improvements from the 1999 impact fee update ordinance, instead of the older cost numbers used by Mr. Drebick's independent fee calculation. OMC 15.06.040 D. states that "[i]mpact fees shall be assessed at the time the complete building permit or occupancy permit application is submitted for each unit in the development, using the impact

fee schedule then in effect." The impact fee schedule incorporates estimates of the cost of the various transportation improvements. At the time Mr. Drebick submitted a complete building permit application, the 1999 update had not been adopted. Therefore, the cost estimates from the 1999 update should not be used in calculating the Drebick impact fee.

VI. Fees and costs.

A Hearing Examiner does not have jurisdiction over claims brought under Chap. 64.40 RCW. Therefore, I lack any authority to award costs or fees under that statute as requested in Mr. Drebick's brief of September 17, 1999. (Ex. 1, Att. K.) If a Hearing Examiner possessed that authority, I would not award the costs or fees requested by the Appellant. The arguments and positions of the City did not remotely approach the level required for that sort of award. On the contrary, the arguments presented by the City, and those by Mr. Drebick, were the work of counsel operating at high levels of skill and professionalism.

DECISION

The Decision of the Director of May 7, 1999 on the independent fee calculation submitted by John Drebick is affirmed in part and reversed in part, as described below:

1. The Director's decision is affirmed on the issue of the time period over which the costs of new system improvements should be distributed. See Conclusions of Law, Part IV. The City's method of distributing the costs of system improvements which are made necessary by new development in each six-year period among that new development in that same time period is consistent with governing law.

2. The Director's decision is affirmed on the issue of which edition of the ITE Manual should be used to project the afternoon peak hour trips generated by the Drebick proposal.

See Conclusions of law, Part III. The City was correct to use the 5th Edition for the Drebick proposal.

3. The Director's decision is reversed on the issue of whether the Drebick impact fees comply with the relationship, proportionality and benefit requirements of RCW 82.02.050 (3). See Conclusions of Law, Part II. Those requirements describe the Legislature's view of fairness in assessing impact fees. The impact fees assessed the Drebick proposal do not comply with those requirements. Therefore, OMC 15.10.020 D. requires that the Drebick impact fees be adjusted based on principles of fairness to comply with the requirements of RCW 82.02.050 (3).

This decision holds that certain aspects of the impact fees imposed by the City on the Drebick proposal are inconsistent with statutory requirements. This decision also upholds the Director's rejection of the independent fee calculation submitted by Mr. Drebick on several grounds. Neither the fees imposed by the City nor the independent fee calculation submitted by Mr. Drebick may be affirmed. Therefore, this matter is remanded to the Director for adjustments to the Drebick impact fees in a manner consistent with this decision.

Dated this 2nd day of November, 2000

/s/ Thomas R. Bjorgen
Thomas R. Bjorgen
Hearing Examiner

Appendix F–1

FILED APR. 14, 2006

THE SUPREME COURT OF WASHINGTON

CITY OF OLYMPIA, a Washington code city,	)	
	)	MANDATE
Petitioner,	)	
	)	NO. 75270-2
v.	)	
	)	C/A No. 29018-9-II
JOHN DREBICK and JANE DOE DREBICK, husband and wife, d/b/a DREBICK INVESTMENTS,	)	Thurston County No. 00-2-02152-3
Respondents.	)	

THE STATE OF WASHINGTON TO:

The Superior Court of the State of Washington in and for Thurston County.

The opinion of the Supreme Court of the State of Washington filed on January 19, 2006, became final in the above entitled cause on April 13, 2006. This cause is mandated to the superior court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.

Pursuant to Rule of Appellate Procedure 14.3, costs are taxed as follows: Costs in the amount of $1,064.15 are awarded in favor of Petitioner City of Olympia and against Respondents Drebick, et ux., et al. Order Denying Motion for Reconsideration was entered herein on April 13, 2006; copy attached.

SEAL OF THE SUPREME COURT STATE OF WASHINGTON

I have affixed the seal of the Supreme Court of the State of Washington and filed this Mandate this 14th day of April, 2006.

/s/ C. J. Merritt

C. J. MERRITT
Clerk of the Supreme Court, State of Washington

cc: Hon. Christine A. Pomeroy, Judge
Hon. Betty Gould, Clerk
Thurston County Superior Court
Hon. J. Dean Morgan, Judge
Hon. David Ponzoha, Clerk
Court of Appeals Division II
David John Lenci
Julie Anne Halter
Alexander Weal Mackie
Kristopher Ian Tefft
Bob C. Sterbank
John Edward Vanek
Russell Clayton Brooks
Robin L. Rivett
Jeffrey Scott Myers
Marilee Jones Scarbrough
Eric S. Merrifield
Samuel A. Rodabough
Reporter of Decisions

West's Revised Code of Washington Annotated Currentness
Title 82. Excise Taxes (Refs & Annos)
Chapter 82.02. General Provisions (Refs & Annos)

82.02.020. State preempts certain tax fields—Fees prohibited for the development of land or buildings—Voluntary payments by developers authorized—Limitations—Exceptions

Except only as expressly provided in chapters 67.28 and 82.14 RCW, the state preempts the field of imposing taxes upon retail sales of tangible personal property, the use of tangible personal property, parimutuel wagering authorized pursuant to RCW 67.16.060, conveyances, and cigarettes, and no county, town, or other municipal subdivision shall have the right to impose taxes of that nature. Except as provided in RCW 82.02.050 through 82.02.090, no county, city, town, or other municipal corporation shall impose any tax, fee, or charge, either direct or indirect, on the construction or reconstruction of residential buildings, commercial buildings, industrial buildings, or on any other building or building space or appurtenance thereto, or on the development, subdivision, classification, or reclassification of land. However, this section does not preclude dedications of land or easements within the proposed development or plat which the county, city, town, or other municipal corporation can demonstrate are reasonably necessary as a direct result of the proposed development or plat to which the dedication of land or easement is to apply.

This section does not prohibit voluntary agreements with counties, cities, towns, or other municipal corporations that allow a payment in lieu of a dedication of land or to mitigate a direct impact that has been identified as a consequence of a proposed development, subdivision, or plat. A local government shall not use such voluntary agreements for local off-site transportation improvements within the geographic boundaries

of the area or areas covered by an adopted transportation program authorized by chapter 39.92 RCW. Any such voluntary agreement is subject to the following provisions:

(1) The payment shall be held in a reserve account and may only be expended to fund a capital improvement agreed upon by the parties to mitigate the identified, direct impact;

(2) The payment shall be expended in all cases within five years of collection; and

(3) Any payment not so expended shall be refunded with interest to be calculated from the original date the deposit was received by the county and at the same rate applied to tax refunds pursuant to RCW 84.69.100; however, if the payment is not expended within five years due to delay attributable to the developer, the payment shall be refunded without interest.

No county, city, town, or other municipal corporation shall require any payment as part of such a voluntary agreement which the county, city, town, or other municipal corporation cannot establish is reasonably necessary as a direct result of the proposed development or plat.

Nothing in this section prohibits cities, towns, counties, or other municipal corporations from collecting reasonable fees from an applicant for a permit or other governmental approval to cover the cost to the city, town, county, or other municipal corporation of processing applications, inspecting and reviewing plans, or preparing detailed statements required by chapter 43.21C RCW.

This section does not limit the existing authority of any county, city, town, or other municipal corporation to impose special assessments on property specifically benefitted thereby in the manner prescribed by law.

Nothing in this section prohibits counties, cities, or towns from imposing or permits counties, cities, or towns to impose

water, sewer, natural gas, drainage utility, and drainage system charges: PROVIDED, That no such charge shall exceed the proportionate share of such utility or system's capital costs which the county, city, or town can demonstrate are attributable to the property being charged: PROVIDED FURTHER, That these provisions shall not be interpreted to expand or contract any existing authority of counties, cities, or towns to impose such charges.

Nothing in this section prohibits a transportation benefit district from imposing fees or charges authorized in RCW 36.73.120 nor prohibits the legislative authority of a county, city, or town from approving the imposition of such fees within a transportation benefit district.

Nothing in this section prohibits counties, cities, or towns from imposing transportation impact fees authorized pursuant to chapter 39.92 RCW.

Nothing in this section prohibits counties, cities, or towns from requiring property owners to provide relocation assistance to tenants under RCW 59.18.440 and 59.18.450.

Nothing in this section limits the authority of counties, cities, or towns to implement programs consistent with section 2 of this act, nor to enforce agreements made pursuant to such programs.

This section does not apply to special purpose districts formed and acting pursuant to Titles 54, 57, or 87 RCW, nor is the authority conferred by these titles affected.

Appendix H–1

West's Revised Code of Washington Annotated Currentness
Title 82. Excise Taxes (Refs & Annos)
Chapter 82.02. General Provisions (Refs & Annos)

82.02.050. Impact fees—Intent—Limitations

(1) It is the intent of the legislature:

(a) To ensure that adequate facilities are available to serve new growth and development;

(b) To promote orderly growth and development by establishing standards by which counties, cities, and towns may require, by ordinance, that new growth and development pay a proportionate share of the cost of new facilities needed to serve new growth and development; and

(c) To ensure that impact fees are imposed through established procedures and criteria so that specific developments do not pay arbitrary fees or duplicative fees for the same impact.

(2) Counties, cities, and towns that are required or choose to plan under RCW 36.70A.040 are authorized to impose impact fees on development activity as part of the financing for public facilities, provided that the financing for system improvements to serve new development must provide for a balance between impact fees and other sources of public funds and cannot rely solely on impact fees.

(3) The impact fees:

(a) Shall only be imposed for system improvements that are reasonably related to the new development;

(b) Shall not exceed a proportionate share of the costs of system improvements that are reasonably related to the new development; and

(c) Shall be used for system improvements that will reasonably benefit the new development.

(4) Impact fees may be collected and spent only for the public facilities defined in RCW 82.02.090 which are addressed by a capital facilities plan element of a comprehensive land use plan adopted pursuant to the provisions of RCW 36.70A.070 or the provisions for comprehensive plan adoption contained in chapter 36.70, 35.63, or 35A.63 RCW. After the date a county, city, or town is required to adopt its development regulations under chapter 36.70A RCW, continued authorization to collect and expend impact fees shall be contingent on the county, city, or town adopting or revising a comprehensive plan in compliance with RCW 36.70A.070, and on the capital facilities plan identifying:

(a) Deficiencies in public facilities serving existing development and the means by which existing deficiencies will be eliminated within a reasonable period of time;

(b) Additional demands placed on existing public facilities by new development; and

(c) Additional public facility improvements required to serve new development.

If the capital facilities plan of the county, city, or town is complete other than for the inclusion of those elements which are the responsibility of a special district, the county, city, or town may impose impact fees to address those public facility needs for which the county, city, or town is responsible.

No. 06-223

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SEP 13 2006
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SUPREME COURT, U.S.

In The
Supreme Court of the United States

JOHN DREBICK and JANE DOE DREBICK,
husband and wife, d/b/a DREBICK INVESTMENTS,

Petitioners,

v.

CITY OF OLYMPIA, a Washington code city,

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court Of Washington

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether this Court should deny the Petition for Writ of Certiorari because this case presents no federal question since this Court and the lower federal and state courts have uniformly and consistently held that the heightened takings standards articulated in *Nollan* and *Dolan* do not apply to the type of legislatively established generally applicable impact fees at issue in this case.

2. Whether this Court should deny the Petition for Writ of Certiorari because, consistent with this uniform authority, the Washington Supreme Court correctly applied the appropriate standard to uphold the impact fees at issue in this case.

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INTRODUCTION[1]

This case involves the Washington Supreme Court's straightforward decision to affirm a requirement that a local developer pay a city transportation impact fee (TIF) levied pursuant to a Washington statute and an ordinance adopted by the Olympia city council. In so ruling, the Washington Supreme Court refused to apply the heightened "essential nexus" and "rough proportionality" standards articulated in *Nollan v. California Coastal Commission*[2] and *Dolan v. City of Tigard*.[3] Neither the United States Supreme Court nor the Washington Supreme Court has determined that the tests used in those cases to evaluate land exactions should be "extended to the consideration of fees imposed to mitigate the direct impacts of a new development, much less to the consideration of more general growth impact fees imposed pursuant to statutorily authorized local ordinances."[4]

Despite this unremarkable ruling, Drebick seeks this Court's review, claiming its recent clarification of regulatory takings law in *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005) "left unsettled" the applicability of the *Nollan/Dolan* standard to legislative, as opposed to adjudicative, exactions.

---

[1] The City has not included herein a list of parties to the proceeding, the citations of official and unofficial reports of the opinions and unofficial reports of opinions and orders entered in the case, the statement of the basis for jurisdiction, or the constitutional provisions, treaties, statutes, ordinances, and regulations involved in the case because the City is satisfied with their presentation by Drebick. SUP. CT. R. 15(3); SUP. CT. R. 24(2).

[2] *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987).

[3] *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

[4] Appendix A-12 (citing *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 702-03 (1999)).

Petition for Writ of Certiorari, at 3 (citing *Garneau v. City of Seattle*, 147 F.3d 802, 811 (9th Cir. 1998)). As a result of *Lingle*, Drebick asserts that a conflict now exists between lower state courts regarding the correct application of *Nollan* and *Dolan*, and that this alleged conflict merits review by this Court. Drebick is in error on both counts.

First, this Court's recent quartet of regulatory takings decisions leaves no doubt that *Nollan* and *Dolan's* heightened standards apply only to (1) ad hoc, adjudicative land use decisions (2) conditioning development approval on the dedication of real property. Indeed, this Court's most recent ruling in *Lingle*, in language unacknowledged by Drebick, affirms this Court's prior decisions:

> Both *Nollan* and *Dolan* involved Fifth Amendment takings challenges to *adjudicative land-use exactions* – specifically, government demands that a landowner *dedicate an easement* allowing public access to her property as a condition of obtaining a development permit.
>
> * * *
>
> The Court further refined this requirement in *Dolan,* holding that an *adjudicative exaction* requiring dedication of private property must also be "rough[ly] proportiona[l]" . . . both in nature and extent to the impact of the proposed development.
>
> * * *
>
> . . . *Nollan* and *Dolan* both *involved dedications of property* so onerous that, outside the exactions context, they would be deemed *per se* physical takings.

Lingle, 544 U.S. at 546-47 (emphasis added). This Court's decisions conclude that *Nollan* and *Dolan* do not apply

where legislatively imposed fees are not the functional analog of real property dedications.[5] Drebick's assertion that the issue is unresolved lacks merit.[6]

Drebick's second contention – that there is a "split" among lower courts regarding the application of the *Nollan/Dolan* standard – is also incorrect. Lower state and federal courts have consistently followed this Court's guidance beginning with *Del Monte Dunes* in 1999, and continuing through *Lingle* in 2005.[7] To the extent Drebick cites cases purportedly to the contrary, most were decided before this Court issued its decisions in these important cases; others are materially distinguishable.

In sum, this Court's takings precedent resolves the issue on which Drebick seeks review. The Washington Supreme Court's decision is consistent with this precedent, as are the decisions of the lower federal and state courts. There is no split among the lower federal or state courts and no federal question presented. Therefore, nothing warrants this Court's review.

---

[5] *See Del Monte Dunes*, 526 U.S. at 702-03 (1999). *See also Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002); *Lingle*, 544 U.S. 528.

[6] Drebick fails to explain how its citation to the Ninth Circuit's 1998 *Garneau* decision, issued seven years prior to this Court's decision in *Lingle*, supports the proposition that the issue remains "unsettled."

[7] After *Lingle*, state courts have determined that *Nollan* and *Dolan* apply only to adjudicative exaction of a dedication of real property. *See Wisconsin Builders Ass'n v. Wisconsin Dept. of Transp.*, 702 N.W.2d 433 (Wis. App. 2005); *Herzberg v. County of Plumas*, 34 Cal.Rptr.3d 588 (Cal. App. 2005). Drebick cites neither of these recent cases.

COUNTERSTATEMENT OF THE CASE

In 1990, as part of a continuing struggle to manage growth and to contain urban sprawl, the Washington State Legislature adopted the Growth Management Act ("GMA"). RCW Ch. 36.70A. This comprehensive planning statute is designed to give local governments the authority and resources necessary to plan for and to manage growth and development within their communities.

As part of the GMA, the Washington Legislature adopted RCW 82.02.050-.090, authorizing local governments to condition development approval on the payment of impact fees to defray a portion of the costs arising from new growth and development. The Legislature's express intent is to establish "standards by which . . . [local governments] may require, by ordinance, that new growth and development pay a proportionate share of the cost of the new facilities needed to serve new growth and development. . . ." RCW 82.02.050(1)(b). As a safeguard, the Legislature requires that a local government's "procedures and criteria" for imposing impact fees must protect "specific developments" from impact fees that are "arbitrary" or that duplicate the amount paid for "the same impact." *Petition for Writ of Certiorari,* Appendix ("Appendix") A-5.

Exercising the authority granted by RCW 82.02.050(2)[8] and adhering to the requirements of RCW 82.02.060,[9] the

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[8] Under this provision, local governments may use GMA impact fees to pay only part of the cost of system improvements needed to serve new development; such costs cannot be funded solely through impact fees. RCW 82.02.050(2).

[9] RCW 82.02.060 requires that the local ordinance by which impact fees are imposed must include a schedule of impact fees which are adopted for each type of development activity. That schedule must be

(Continued on following page)

City adopted a TIF ordinance. As authorized by RCW 82.02.060(6), the City elected to base its fee structure on a single service area coterminous with its designated urban growth area (UGA). Appendix E-14.[10] As summarized in the hearings examiner's decision, the City calculated the TIF amounts based on traffic volumes generated by various classes of new development. It did so by (1) projecting the total number of new trips generated by new development; (2) projecting the total cost of transportation projects needed to serve new growth expected in the next six years, not including existing deficiencies or pass-through traffic; (3) dividing the projected cost by the projected number of trips to derive the average cost of a new trip; and (4) converting this average cost into impact fees for specific types and sizes of development. Appendix E-13. The City's TIF ordinance also allowed developers to request departures from the fee schedule and permitted

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based on a formula which incorporates (1) the cost of public facilities necessitated by new development; (2) an adjustment to the cost of the public facilities for past or future payments made or reasonably anticipated to be made by new development to pay for a particular system; (3) the availability of other means of funding; (4) the cost of existing public facilities improvements; and (5) methods by which the improvements were financed. RCW 82.02.060(1)(a)-(e). It also requires the local impact fee ordinance to (1) provide a credit for the value of any land dedicated for the improvement or construction of system improvements provided by the developer to facilities identified on the capital facilities plan; (2) allow the city to consider unusual circumstances in specific cases to ensure that the fees are imposed fairly; (3) include a provision for calculating the amount of the fee to be imposed on a particular development that permits consideration of studies and data submitted by the developer to adjust the amount of the fee, if appropriate; and (4) establish one or more reasonable service areas within which impact fees for various land uses categories are calculated and imposed. RCW 82.02.060(2)-(6).

[10] Drebick did not challenge the City's decision to establish a single service area.

the City to consider independent fee calculations on a case-by-case basis. Appendix E-6.

In July 1998,[11] Drebick submitted a land use application for a new 54,698 square-foot office building to be constructed within the Olympia city limits. Appendix E-5. The City approved Drebick's proposal, subject to payment of the applicable TIF. *Id.* Although Drebick requested that the City apply one of three alternative independent fee calculation amounts, the City denied the request because the methodology Drebick used to calculate those amounts failed to meet the TIF ordinance's accuracy and reliability criteria. Appendix E-6 – E-8.

Drebick appealed the denial to the hearings examiner, who concluded that Drebick's proposed building contained no unique or special characteristics justifying an independent fee calculation. Appendix E-27, E-55. The hearings examiner then made the following unchallenged findings regarding the City's legislatively adopted impact fee:

> 34. . . . [T]he impact fee assessed a specific development *is proportionate to and reasonably related to the jurisdiction-wide need for new transportation improvements created by that development.*
>
> 35. . . . Under Olympia's method the transportation impact fee assessed a specific development *is used for improvements that will reasonably benefit that development, if benefit is judged by*

[11] The Petition for Writ of Certiorari erroneously lists the date as July, 1988. *Petition for Writ of Certiorari*, 4.

> *the effect of the transportation improvements in the jurisdiction as a whole.*

Appendix E-14 (emphasis added).[12] Notwithstanding these important findings, the hearings examiner reversed the City's decision, asserting that Drebick's TIF assessment did not meet the statutory relationship and proportionality standards set forth in RCW 82.02.050.[13] Appendix E-55. The trial court reversed and reinstated the TIF, concluding (as the hearings examiner did) that the fee was proportionate and related to the City's jurisdiction-wide need for transportation improvements necessitated by new development in accordance with RCW 82.02.050. Appendix D-6. Drebick appealed the decision to the Court of Appeals, which reversed and remanded the matter to the City for a recalculation of the TIF, reasoning that it could not exceed "the individualized impacts of Drebick's specific project." Appendix C-23.

The Washington Supreme Court reversed that decision, holding that the City's legislatively established method for calculating TIFs complied with the relational standards prescribed in RCW 82.02.050(3). Appendix A-19 – A-20. Countering the dissent's unsupported assertion that the Legislature intended to adopt the *Nollan/Dolan* heightened regulatory takings standard as part of that

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[12] These unchallenged findings are verities on appeal. *State v. Moses*, 422 P.2d 775 (Wash.), *appeal dismissed, cert. denied*, 389 U.S. 428, *reh'g denied*, 390 U.S. 930 (1967).

[13] Impact fees imposed pursuant to GMA must: (1) only be imposed for system improvements that are reasonably related to the new development; (2) not exceed a proportionate share of the costs of system improvements that are reasonably related to the new development; and (3) be used for system improvements that will reasonably benefit the new development. RCW 82.02.050(3)(a)-(c).

statute, the Court emphasized that neither of those cases address the imposition of impact fees. Instead, those cases address the authority of a local government to condition development approval on a property owner's dedication of property for a public use. Appendix A-11 – A-12. The Washington Supreme Court explained further that the dissent "inaptly" cited decisions from other jurisdictions applying the *Nollan/Dolan* standard to direct mitigation fees (covered by a different statutory provision in Washington), not to the legislatively prescribed impact fees at issue in this case. Appendix A-12. Determining that the heightened review standards of *Nollan* and *Dolan* do not apply to legislatively adopted TIFs, the Washington Supreme Court held that "the GMA impact fee statutes do not require local governments to calculate an impact fee by making individualized assessments of the new development's direct impact on each improvement planned in a service area." Appendix A-1.

SUMMARY OF REASONS TO DENY THE WRIT

1. Legislatively adopted, generally applicable impact fees are not the proper subject of regulatory takings analysis, especially one requiring heightened scrutiny. This Court has routinely held that the heightened essential nexus and rough proportionality standards articulated in *Nollan* and *Dolan* apply only in the limited, narrow context where the dedication of real property is required as a condition of development approval.

2. There is no split among the lower courts, which uniformly agree that the heightened regulatory takings standards set forth in *Nollan* and *Dolan* do not apply to

legislatively enacted, generally applicable impact fees designed to fund infrastructure improvements within communities at large.

3. Consistent with the uniform holdings in cases from this Court and jurisdictions around the country, the Washington State Supreme Court correctly concluded that *Nollan* and *Dolan* do not apply to the City's legislatively enacted TIF.

ARGUMENT

This case presents no issue of federal law, nor is there any conflict among the lower federal or state courts. It is well-established that legislatively adopted, generally applicable impact fees are not subject to constitutional takings analysis in the first instance. Even if they were, this Court has made clear that the test set forth in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978) would apply. Contrary to Drebick's arguments, no lower federal or state court has ever applied the individualized, heightened scrutiny called for by *Nollan* and *Dolan* to legislatively adopted, generally applicable impact fees. Drebick's attempt to manufacture conflict among the lower courts is a transparent attempt to convince the Court to revisit its clear takings precedent. The Petition for Writ of Certiorari should be denied.

A. Legislatively Adopted Impact Fees Are Not Subject To Constitutional Takings Analysis So Further Review By This Court Is Unwarranted.

As revenue raising measures imposed under a local government's taxing authority, impact fees and other

similar "user fees" are not subject to constitutional takings analysis. As this Court has recognized, simply asking a party to pay a fee does not implicate private property rights or the Takings Clause of the Fifth Amendment. *United States v. Sperry Corp.*, 493 U.S. 52 (1989). In *Sperry*, this Court rejected an assertion that monetary deductions from awards made by the Iran-United States Claims Tribunal in favor of United States claimants were takings, stating that

> [i]t is artificial to view deductions of a percentage of a monetary award as physical appropriations of property. . . . If the deduction in this case were a physical occupation requiring just compensation, so would be any fee for services, including a filing fee that must be paid in advance. Such a rule would be an extravagant extension of *Loretto*.

Sperry, 493 U.S. at 62 n.9 (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)). *See also Brown v. Legal Foundation of Washington*, 538 U.S. 216, 242 n.2 (2003) (Scalia, J. dissenting) (" . . . I am unaware of *any* use to which state taxes cannot constitutionally be devoted. . . . Taxes and user fees, since they are not 'takings,' *see United States v. Sperry Corp.*, 493 U.S. 52, 63, 110 S.Ct. 387, 107 L.Ed.2d 290 (1989), are simply not subject to the 'public use' requirement, and so their constitutional legitimacy is entirely irrelevant to the existence *vel non* of a public use"). State courts are in accord, even where the fee at issue is charged as a condition of development approval. *Dudek v. Umatilla County*, 69 P.3d 751, 757 (Or. App. 2003) ("[T]he 'mere imposition of an obligation to pay money . . . does not give rise to a claim under the Takings Clause of the Fifth Amendment'") (citing *Kitt v. U.S.*, 277 F.3d 1330, 1336 (Fed. Cir.), *modified on reh'g on*

other grounds, 288 F.3d 1355 (Fed. Cir. 2002) (quoting *Commonwealth Edison Co. v. U.S.*, 271 F.3d 1327, 1340 (Fed. Cir. 2001), *cert. denied*, 535 U.S. 1096 (2002))).

Consistent with this line of reasoning, Washington courts have expressly acknowledged that impact fees are not regulatory, but are essentially revenue-raising taxes. *New Castle Investments v. City of LaCenter*, 989 P.2d 569, 575 (Wash. App. 1999), *review denied*, 5 P.3d 9 (Wash. 2000) (" . . . TIFs are fees that augment tax dollars; they are another source of revenue for improvements that benefit the public in general, and they are not intended to regulate the particular development"). As a result, the Washington Supreme Court in this case did not conduct a regulatory takings analysis, but instead focused its inquiry on whether the impact fee was imposed consistent with its statutory authority. Appendix A-3, n.1. Concluding it was, the Court properly ended its inquiry. This case presents no question worthy of this Court's review, and Drebick's Petition for Writ of Certiorari should be denied.

B. This Court has Repeatedly Held that the *Penn Central* Test Applies to Regulatory Takings Claims.

Even if a regulatory takings analysis applies to legislatively adopted, revenue-raising impact fees, this Court has made clear through the series of cases beginning with *Del Monte Dunes* that regulatory takings claims are properly evaluated under the factors set forth in *Penn Central*. *Del Monte Dunes*, 526 U.S. at 702-03 (refusing to extend *Dolan's* heightened scrutiny beyond the special context of land use decisions conditioning approval of development on the dedication of property to a public use); *Palazzolo*, 533 U.S. at 616-18 (concluding regulatory

takings claim resulting from wetlands regulations should have been evaluated under the principals set forth in *Penn Central*); *Tahoe-Sierra Preservation Council,* 535 U.S. at 322 ("Our regulatory takings jurisprudence . . . is of more recent vintage and is characterized by 'essentially ad hoc, factual inquiries,' *Penn Central*, 429 U.S. at 124, 98 S.Ct. 2646, designed to allow 'careful examination and weighing of all the relevant circumstances.'") (citation omitted); *Lingle*, 544 U.S. at 540, 546 (outside of context of permanent physical invasions, regulatory deprivation of "all economically beneficial use," and land use exactions requiring the dedication of property, regulatory takings challenges are governed by the *Penn Central* test).[14] Nothing about the Washington Supreme Court's decision in this case contradicts this well-established precedent, and there is no issue warranting further review.

Nollan and *Dolan* involved the government's exaction of an interest in specific real property, not simply the payment of money. This Court and others have routinely made clear that the heightened review standards articulated in *Nollan* and *Dolan* apply only to ad hoc development conditions requiring the dedication of real property. In *Del Monte Dunes*, this Court refused to apply *Dolan's* heightened takings standards to a city's repeated rejections of development proposals, stating

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[14] Under the *Penn Central* test, where a regulation places limitations on land that fall short of eliminating all economically beneficial use, courts evaluate whether a taking has nevertheless occurred based on the more deferential application of a complex set of factors. These factors include "the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action." *Palazzolo*, 533 U.S. at 617 (citing *Penn Central*, 438 U.S. at 124). *Accord Guimont v. Clarke*, 854 P.2d 1 (Wash. 1993), *cert. denied*, 510 U.S. 1176 (1994).

that *Dolan's* rule considers whether dedications demanded as conditions of development approval are proportional to the development's anticipated impacts. *Del Monte Dunes*, 526 U.S. 702-03. This Court has specifically declined to extend the rule beyond the special context of land use decisions conditioning approval of development on the dedication of property to public use. *Id. See also Rogers Machinery, Inc. v. Washington County*, 45 P.3d 966, 973 (Or. App. 2002), *cert. denied,* 538 U.S. 906 (2003) (refusing review of an Oregon Supreme Court ruling that TIFs are not subject to *Nollan* and *Dolan's* heightened scrutiny).

In *Lingle,* the Court reinforced the limited applicability of *Nollan* and *Dolan.* That case involved a challenge to a Hawaii statute limiting the amount of rent that oil companies could charge dealers leasing company-owned stations. Although the Court focused its analysis on the inappropriate use of the "substantially advances" test as part of regulatory takings jurisprudence, in doing so, it comprehensively summarized the current state of regulatory takings law. According to the Court, with the exception of two narrow categories, which are (1) the deprivation of all economically viable use (governed by *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003 (1992)); and (2) land use exactions where government has demanded landowners dedicate a portion of their property for public use as a condition of obtaining development approval (governed by *Nollan* and *Dolan*),[15] all other regulatory takings claims

[15] *See Lingle*, 544 U.S. at 574 (citing *Dolan*, 512 U.S. at 385) ("As the Court explained in *Dolan*, these cases involve a special application of the 'doctrine of "unconstitutional conditions," ' which provides that 'the government may not require a person to give up a constitutional right – here the right to receive just compensation when property is taken for a public use – in exchange for a discretionary benefit conferred by the

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are properly governed by the *Penn Central* balance of factors.[16] *Lingle*, 544 U.S. at 538, 546. *See also Clajon Production Corp. v. Petera*, 70 F.3d 1566, 1578 (10th Cir. 1995) (*Nollan* and *Dolan* "are limited to the context of development exactions where there is a physical taking or its equivalent"); *Commercial Builders v. Sacramento*, 941 F.2d 872, 875 (9th Cir.), *cert. denied*, 504 U.S. 931 (1991) (*Nolan* inapplicable to housing mitigation fee). The *Lingle* court emphasized that adjudicatory decisions conditioning development approval on the dedication of real property are singled out for heightened scrutiny under *Nollan* and *Dolan* because they are tantamount to physical appropriations. *Lingle*, 544 U.S. at 546-47. The same is not true for legislatively adopted formulaic impact fees, which are consistently applied to all new development to raise revenue for infrastructure improvements necessitated by new development generally.

C. Consistent with This Court's Pronouncements, No Court Has Ever Applied *Nollan* and *Dolan's* Heightened Scrutiny to Legislatively Adopted Impact Fees.

Despite Drebick's arguments to the contrary, there is no conflict among the lower federal and state courts, whose decisions are entirely consistent with existing precedent. No lower federal or state court has ever applied *Nollan* and *Dolan's* individualized, heightened scrutiny to legislatively adopted impact fees, which are traditionally

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government where the benefit has little or no relationship to the property' ").

[16] Permanent physical invasions of property are governed by *Loretto*, 458 U.S. 419.

afforded greater deference. "It has long been axiomatic that legislative and quasi-legislative enactments enjoy a significantly higher degree of judicial deference than individualized adjudications." *Homebuilders Ass'n of Metropolitan Portland v. Tualatin Hills Park and Recreation Dist.*, 62 P.3d 404, 410 (Or. App. 2003) (citing *Bi-Metallic Co. v. Colorado*, 239 U.S. 441, 445 (1915); *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993)).[17]

> One critical difference between a legislatively based fee and a specific, discretionary adjudicative determination is that the risk of leveraging or extortion on the part of the government is virtually nonexistent in a fee system. When a governmental entity assesses a generally applicable, legislatively based development fee, all similarly situated landowners are subject to the same fee schedule, and a specific landowner cannot be singled out for extraordinary concessions as a condition of development.

Krupp v. Breckenridge Sanitation Dist., 19 P.3d 687, 696 (Colo. 2001) (citing *Home Builders Ass'n of Central Arizona v. City of Scottsdale*, 930 P.2d 993, 1000 (Ariz. 1997) and *Loyola Marymount Univ. v. Los Angeles Unified Sch. Dist.*, 53 Cal.Rptr.2d 424, 434 (1996)).

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[17] *See also San Remo Hotel, LP v. City and County of San Francisco*, 41 P.3d 87, 103 (Cal.4th 2002) (citing *Santa Monica Beach, Ltd. v. Superior Court*, 968 P.2d 993, 966 (Cal.4th 1999) (quoting *Dolan*, 512 U.S. at 385) (" . . . The most deferential review of land use decisions appears to be for those that pertain to 'essentially legislative determinations' that do not require any physical conveyance of property' ")); *Rogers Machinery*, 45 P.3d at 973 ("[W]hen the government regulates property without physically occupying it, the Takings Clause is much less protective of the interests of the property owner and much more deferential to the public interests served.")

Notwithstanding this important distinction, Drebick nevertheless argues that the heightened standards of *Nollan* and *Dolan* should apply to legislatively adopted, generally applicable impact fees. This argument, however, has been consistently rejected by courts that considered it.[18] In an unpublished decision cited by Drebick, *Nat'l Ass'n of Home Builders of the United States, et al. v. Chesterfield County,* 92 F.3d 1180, 1996 WL 423061 at *1 (4th Cir. 1996) (unpublished), *cert. denied,* 519 U.S. 1056 (1997), the Fourth Circuit expressly rejected the argument that *Dolan's* rough proportionality standard required the county to make a stringent, individualized determination before calculating the appropriate fee due under the county's cash proffer policy. According to the court, "[s]uch a requirement approaches 'exact proportionality' which is not required under the Constitution, nor feasible in practice" because the fees prescribed will apply even to projects that have not yet even been conceived. *Nat'l Ass'n of Home Builders of the United States,* 1996 WL 423061 at *2.

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[18] Moreover, if Drebick contends that such fees are subject to *Nollan* and *Dolan's* heightened scrutiny, then all forms of taxation would be susceptible to such challenge. The Washington Supreme Court has determined that the imposition of generally applicable fees designed to raise revenue for needed capital improvements is a tax, requiring statutory authorization to be valid. *Hillis Homes v. Snohomish County*, 650 P.2d 193 (Wash. 1982), *superseded by statute as stated in Ivy Club Investors, Ltd. Partnership v. City of Kennewick,* 699 P.2d 782 (Wash. App. 1985). Here, Drebick does not challenge an ad hoc adjudicatory exaction of real property like those at issue in *Nollan* and *Dolan*, but instead challenges the ability of state and local governments to exercise their taxing authority to raise revenue generally. The City is aware of no authority that would subject such excise taxes to a regulatory takings analysis, much less heightened scrutiny under *Nollan* and *Dolan.*

Decisions from courts in Colorado, Oregon, Arizona, Kansas and Maryland have consistently held that *Nollan* and *Dolan's* heightened scrutiny does not apply to legislatively mandated fees. In *Krupp*, the Colorado Supreme Court affirmed a decision that legislatively adopted plant investment fees[19] charged to all building projects within a sanitation district were not subject to the *Nollan/Dolan* takings analysis.

> Each PIF assessment is calculated by publicly promulgated standards that are applicable to all new developments within the District. The *PIF is not imposed adjudicatively* in the *Nollan/Dolan* sense, and is not an assessment unique to the Krupps. Moreover, the PIF is neither a land use regulation *nor an exaction of property* as a condition of development. Consequently, it does not fall into the relatively narrow category of development exactions addressed by *Nollan* and *Dolan*.

Krupp, 19 P.3d at 698 (emphasis added).

In *Rogers Machinery*, the Oregon Supreme Court similarly refused to apply the *Nollan* and *Dolan* analysis to legislatively adopted TIFs,[20] stating:

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[19] A PIF is a one-time charge, calculated under an established schedule, designed to defray the cost of expanding infrastructure as development increases the demand for services. The PIF must be paid before the town issues a building permit or certificate of occupancy for a new building. *Krupp*, 19 P.3d at 691.

[20] Notably, amici curiae in the *Rogers Machinery* case made precisely the same argument Drebick makes here – that lower courts are split regarding whether *Nollan* and *Dolan* apply to legislatively adopted fees. Brief of Amici Curiae New England Legal Foundation and Atlantic Legal Foundation In Support of Petitioner, Rogers Machinery

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> . . . no significant discretion is involved in the TIF's imposition or calculation. Imposition of the TIF is mandatory on broad classes of property. . . . The TIF ordinance is, in short, precisely the kind of detailed and uniformly applied legislative assessment scheme that courts in other states hold does not fall within the express reach of the implicit rational of *Dolan's* heightened scrutiny test.

Rogers Machinery, 45 P.3d at 981-82.[21] *See also Homebuilders Ass'n of Metropolitan Portland*, 62 P.3d at 409 ("We conclude that . . . the *Nollan/Dolan* 'rough proportionality' test does not apply in determining whether the SDC [system development charge] in this case is a taking for Fifth Amendment purposes.")

In *Home Builders Ass'n of Central Arizona*, the court upheld a challenge to the city's legislatively adopted,

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Co., Inc. v. City of Tigard, No. 02-0750, On Petition for Writ of Certiorari to the Oregon Court of Appeals, 2002 WL 32133662, *6-9 (Dec. 16, 2002). As discussed herein, this Court denied the Petition for Writ of Certiorari in *Rogers Machinery*, and should do the same here.

[21] Moreover, courts that have narrowly extended the heightened review standard have uniformly reasoned that the extension is appropriate because – unlike legislatively adopted impact fees – ad hoc, discretionary conditions and fees imposed on a project-by-project basis can bear special potential for government abuse, and local governments should not be permitted to charge fees for the same type of development conditions, such as the dedication of land, which would require compensation under the Takings Clause. *See, e.g., Ehrlich v. City of Culver*, 911 P.2d 429, 443-44 (Cal.4th), *cert. denied*, 519 U.S. 929 (1996); *Clark v. City of Albany*, 904 P.2d 185, 189 (Or. App. 1995), *review denied*, 912 P.2d 375 (1996) ("For purposes of takings analysis, we see little difference between a requirement that a developer convey title to the part of the property that is to serve a public purpose, and a requirement that the developer himself make improvements on the affected and nearby property and make it available for the same public purpose.")

generally applicable water resource development fee. Finding the legislative ordinance cloaked with a presumption of validity, the Arizona Supreme Court refused to apply the *Nollan/Dolan* standard.

> . . . [I]mpact fees are designed to assist in raising the capital necessary to meet needs that surely will arise in the foreseeable future but whose precise details may not at the outset be quite clear. To require more fixed and certain plans would make it difficult, if not impossible, to prepare in advance for the consequences of continued growth.

Home Builders Ass'n of Central Arizona, 930 P.2d at 997.

Similarly, *McCarthy v. City of Leawood,* 894 P.2d 836 (Kan. 1995), also a case cited by Drebick, involved a TIF calculated using generally accepted traffic engineering principles. Although property owners argued that the fee was a taking, the Kansas Supreme Court concluded that "there is nothing in the [*Dolan*] opinion, however, which would apply the same conclusion to Leawood's conditioning certain land uses on payment of a fee. The landowners cite no authority for the critical leap which must be made from a fee to a taking of property." *McCarthy*, 894 P.2d at 845.

The Maryland Court of Appeals has also refused to apply *Dolan's* heightened scrutiny to legislatively adopted TIFs imposed as a condition of building permit issuance. *Waters Landing Ltd. Partnership v. Montgomery County*, 650 A.2d 712, 724 (Md. 1994) ("We think *Dolan*, which concerned the Fifth Amendment Takings Clause, is irrelevant to the issue of special benefit assessments and generally inapplicable to this case.")

In an attempt to undermine this wealth of uniform authority, Drebick cites two cases, *Home Builders Ass'n of Dayton and the Miami Valley, et al. v. City of Beavercreek,* 729 N.E.2d 349 (Ohio), *reconsideration denied,* 732 N.E.2d 1002 (Ohio 2000) and *Northern Illinois Home Builders Ass'n, Inc. v. County of Du Page,* 649 N.E.2d 384 (Ill. 1995), to suggest a split among the lower courts regarding *Nollan* and *Dolan's* appropriate applicability. Careful analysis reveals that although the courts in those cases claimed to apply *Dolan's* rough proportionality standards to legislatively adopted impact fees, in practice, they did not. Accordingly, no such split exists.

For example, in *Home Builders Ass'n of Dayton,* the Ohio Supreme Court claimed to apply *Dolan's* rough proportionality standard to TIFs, but it did not conduct the individualized, site specific analysis *Dolan* requires. Instead, it applied a *Penn Central*-like analysis, giving appropriate deference to the legislative enactment.[22] The Ohio court acknowledged that "[g]iven that impact fee ordinances are not subject to precise mathematical formulation, choosing the best methodology is a difficult task that the legislature, not the courts, is better able to accomplish. Rather, a court must only determine whether the methodology used is reasonable based on the evidence presented." *Home Builders Ass'n of Dayton,* 729 N.Ed.2d

[22] The ordinance methodology described by the Ohio court is remarkably similar to the methodology adopted in the City's TIF ordinance here. *See* discussion *supra.* As a result, the Ohio Supreme Court would likely have reached the same result as the Washington Supreme Court did in this case – application of the TIF ordinance is not a taking.

at 357.[23] Although it claimed to apply the *Dolan* standard, the court did not require any evidence of the individualized impact the particular development would have on the transportation infrastructure otherwise required by *Dolan*.[24]

The same analytical flaw plagues *Northern Illinois Home Builders*, another case cited by Drebick, which predates the *Del Monte Dunes* decision and this Court's subsequent regulatory takings decisions. Like the Ohio court, the *Northern Illinois* court claimed to apply a heightened standard of review akin to *Dolan*, under its prior decision in *Pioneer Trust & Savings Bank v. Village of Mount Prospect*, 176 N.E.2d 799 (Ill. 1961). The Illinois court, however, did not employ an individualized, site-specific analysis of impacts. Instead, applying a more deferential standard, the court accepted the city's fee calculation, which was based on an ordinance that predetermined area-wide fees without considering the particular characteristics of a specific development. *Northern Illinois Home Builders*, 649 N.E.2d at 391. Thus, contrary to Drebick's assertion, neither the Ohio nor the Illinois Supreme Court actually applied *Dolan's* rough proportionality standard to

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[23] In that case, the evidence presented consisted of the methodology used to determine the need for roadway improvements funded by the impact fee based on "generally accepted traffic engineering practices," an inventory of existing road facilities, the cost of new facilities needed to accommodate new development generally, and roadway use not associated with new development. *Home Builders Ass'n of Dayton*, 729 N.E.2d at 356-57.

[24] *See also Rogers Machinery*, 45 P.3d at 978 n.13 (citing *Home Builders Ass'n of Dayton*, 729 N.E.2d 349 and noting that although the court in that case states *Dolan* should apply, it does not adhere to the *Dolan* test in its analysis).

generally applicable impact fees.[25] Therefore, there is no conflict among the state high courts and no basis for this Court to grant certiorari.

D. Legislatively Adopted Impact Fee Ordinances Are Subject to Rigorous Statutory Constraints Designed to Prevent Arbitrary Enforcement.

Notwithstanding this well-established and uniform precedent, Drebick argues that this Court should extend *Nollan* and *Dolan's* heightened review standards to legislatively mandated impact fees because they present extraordinary danger of improper leveraging. While courts recognize the possibility that governmental legislation can go too far, in addition to the constitutional constraints outlined in *Palazzolo* and *Penn Central*, legislatively imposed fees are subject to the ordinary constraints of the democratic political process. *San Remo Hotel*, 41 P.3d at 105-06 (Mosk, J., concurring) (noting that a city council charging extortionate fees for all property development unjustifiable by mitigation needs, would likely face widespread and well-financed opposition at the next election). *See also Rogers Machinery,* 45 P.3d at 982.

Moreover, impact fee ordinances like the one at issue in this case have substantial, built-in protections to

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[25] Illinois courts have noted the broad rejection (in *Dolan* itself and in the decisions of numerous state courts) of the specific and uniquely attributable test purportedly relied upon in *Northern Illinois Home Builders*. Yet, Illinois persists in applying this test as a matter of state constitutional law. *See Amoco Oil Co. v. Village of Schaumburg,* 661 N.E.2d 380, 387 n.5 (Ill.App. 1 Dist., 1995), *appeal denied,* 667 N.E.2d 1055 (Ill.), *cert. denied*, 519 U.S. 976 (1996) ("Therefore, the 'specifically and uniquely attributable' test enumerated in *Pioneer Trust* is no longer to be followed when construing the Federal Constitution.")

prevent the kind of extortionary practices that concern Drebick, and to ensure compliance with constitutional standards.[26] Subject to these rigorous legislative parameters, and the constitutional constraints set forth in *Palazzolo, Penn Central* and *Guimont*, specific fee amounts are otherwise entrusted to local legislative bodies' discretion. Impact fee ordinances adopted by local governments around the country are generally required to ensure the fees they impose bear a reasonable relationship to development seeking approval. While the relationship between means and ends need not be so close or so thoroughly established for legislatively imposed fees as for ad hoc fees, the arbitrary and extortionate use of purported mitigation fees, even where legislatively mandated, will

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[26] *See* n.9 *supra.* Additionally, Washington's impact fee statute mandates that local governments may use impact fees to pay only a portion of the cost of system improvements needed to serve new development, and such costs cannot be funded solely through impact fees. RCW 82.02.050(2). Local jurisdictions must impose impact fees through established procedures to ensure that they are not arbitrary or duplicative of fees charged for the same purpose. RCW 82.02.050(1)(c). Impact fees can be collected and spent only for public facilities that are identified in a capital facilities plan that is part of an adopted comprehensive plan. RCW 82.02.050(4). Finally, impact fees must be used to pay for planned system improvements within six years, or are subject to refund. RCW 82.02.070(3); RCW 82.02.080.

Other state impact fee statutes provide similarly rigorous protections. *See, e.g., Home Builders Ass'n of Central Arizona,* 930 P.2d at 995 (citing A.R.S. §9-463.05); *Rogers Machinery,* 45 P.3d at 968-69 (describing Washington County Code, chapter 3.17, the TIF ordinance); *Home Builders Ass'n of Dayton,* 729 N.E.2d at 351-52 (describing City of Beavercreek's impact fee, 93-62); *Homebuilders Ass'n of Metropolitan Portland,* 62 P.3d at 412-13 (describing District resolution's methodology for calculating system development); *Northern Illinois Home Builders Ass'n,* 649 N.Ed.2d 388-91 (describing Du Page County TIF ordinance). *See also Krupp,* 19 P.3d at 690-91 (describing how the District calculated its plant investment fees.)

not pass constitutional muster. *San Remo Hotel,* 41 P.3d at 106.

In sum, the Petition for Writ of Certiorari fails to cite any case, and the City is aware of none, where a court has extended the heightened standards of *Nollan* and *Dolan* to legislatively adopted, generally applicable, revenue raising impact fees. Drebick's assertion that a split among the courts exists on this issue is simply not accurate. Moreover, legislatively adopted impact fee ordinances are generally structured to ensure that new development does not pay more than its fair share of the cost of infrastructure necessitated by that new development. There is no basis for this Court's review, and Drebick's Petition for Writ of Certiorari should be denied.

E. Any Extension of the *Nollan/Dolan* Standard Has Been Limited to Adjudicative, Discretionary Fees that Are the Direct Analog of a Dedication Requirement.

Although the City acknowledges that some lower courts have narrowly expanded the applicability of *Dolan's* rough proportionality analysis to certain monetary exactions, they have done so *only* when the exaction is the discretionarily-imposed, direct analog of a dedication requirement. *See, e.g., Twin Lakes Development Corp. v. Town of Monroe*, 801 N.E.2d 821 (N.Y. 2003), *cert. denied,* 541 U.S. 974 (2004) (applying *Nollan* and *Dolan* essential nexus and rough proportionality standards to towns decision to condition development approval on payment of fees in lieu of parkland dedication); *Dudek,* 69 P.3d 751 (applying *Dolan's* rough proportionality standard to county's enforcement of ordinance conditioning land division approval on a dedicated road or public recorded

easement); *Ehrlich*, 911 P.2d 429 (applying *Nollan* and *Dolan* to city's decision to condition development approval on payment of fee in lieu of dedication for additional public recreational facilities, but not to art in public places fee); *Clark*, 904 P.2d 185 (applying *Dolan* standard to conditions of development approval requiring applicant to improve road abutting development). Those types of ad hoc, adjudicative land use conditions are not at issue here, and this case is not an appropriate forum to consider whether *Nollan* and *Dolan* have been properly extended to these types of conditions.

Nevertheless, Drebick urges this Court to accept review, claiming the lower courts are split as to whether *Nollan* and *Dolan* should apply to legislatively imposed fees or conditions, as opposed to those imposed as part of an adjudicative process. While it is true that courts have noted a categorical distinction between legislatively adopted impact fees and adjudicatively imposed development conditions, in practice those courts uniformly recognize that categorical distinctions are not controlling when determining the applicability of the *Nollan/Dolan* standard. *See, e.g., J.C. Reeves Corp. v. Clackamas County,* 887 P.2d 360, 365 (Or. App. 1994) ("[t]he nature, not the source, of the imposition is what matters"); *Schultz v. City of Grants Pass*, 884 P.2d 569, 573 (Or. App. 1994) (disregarding *Dolan's* legislative/adjudicative decision, and focusing instead on character of decision to determine whether to apply "rough proportionality" standard).

Instead, courts that have extended the *Nollan/Dolan* analysis to discretionarily imposed mitigation conditions routinely evaluate the nature and purpose of the fee or condition and determine whether it is one that bears the potential for governmental abuse. In *City of Portsmouth*

New Hampshire v. Schlesinger, 57 F.3d 12 (1st Cir. 1995), cited by Drebick, the City sought to impose a low-income housing fee to directly mitigate the loss of such housing as a result of condominium conversion. The First Circuit recognized that the fee, though adopted as an ordinance, was not one of general applicability. Rather, it was directed at a specific group of property owners who converted low-income housing units to condominiums. *Id.* at 12-13. Issued well before this Court's recent regulatory takings pronouncements, the court concluded that these property owners were singled out to bear a burden that should be borne by the public as a whole. The First Circuit then applied *Nolan's* standard to conclude that no rational nexus existed between the fee amount charged to developers and any burden imposed on the City due to the conversion. *Id.* at 14.

In *Town of Flower Mound v. Stafford Estates Limited Partnership,* 135 S.W.3d 620, 642 (Tx. 2004), the Texas Supreme Court declined to adopt a bright line rule regarding *Nollan* and *Dolan's* applicability to adjudicative and legislative decisions, recognizing the need to evaluate the nature and purpose of the development conditions imposed. Although the zoning ordinance at issue in *Flower Mound* required developers to construct and pay for improvements to streets abutting their proposed development if those streets failed to meet specified standards – even if the improvements were not necessitated by the impacts of the new development – it was not a generally applicable fee that applied to all new development for the purpose of improving roads within the community. Moreover, in applying the *Nollan* and *Dolan* standards, the court acknowledged the truly adjudicative nature of the town's refusal to grant an otherwise common zoning

ordinance exception. *Town of Flower Mound,* 135 S.W.3d at 625.

While neither *City of Portsmouth* nor *Town of Flower Mound* is instructive regarding the types of impact fees at issue in this case, they are nevertheless consistent with this Court's pronouncements in *Lingle.* The courts in those cases evaluated the underlying nature of development conditions and determined that they fell within the narrow, limited class of ad hoc, discretionary decisions requiring the dedication of real property or its direct analog such that the heightened scrutiny of *Nollan* and *Dolan* should apply. *Lingle*, 544 U.S. at 546-47. Drebick has cited no case, and the City is aware of none, that expands the heightened standards of *Nollan* and *Dolan* to legislatively adopted, generally applicable impact fees, and Drebick can offer no plausible justification for doing so here. There is no issue of federal law that warrants this Court's review.

CONCLUSION

This Court has determined that the heightened standards of *Nollan* and *Dolan* apply in the limited, narrow context of land use decisions conditioning development approval on the dedication of real property. This Court has also determined that the *Nollan* and *Dolan* standards do not apply to legislatively imposed, generally applicable impact fees, user fees and taxes. The lower federal and state court decisions are consistent with this precedent, as is the decision in this case. Because Drebick

raises no issue justifying further review, this Court should deny the Petition for Writ of Certiorari.

Dated this 13th day of September, 2006.

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(6)

No. 06-223

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In the

Supreme Court of the United States

JOHN DREBICK and JANE DOE DREBICK,
husband and wife, d/b/a DREBICK INVESTMENTS,

Petitioners,

v.

CITY OF OLYMPIA, a Washington code city,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Washington

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May a local government avoid the "nexus " and "rough proportionality" tests of *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), by imposing development exactions in the form of "impact" fees?

2. May a local government avoid the "nexus" and "rough proportionality" tests of *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), by imposing development exactions by legislative enactment?

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REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioners John Drebick and Jane Doe Drebick, husband and wife, d/b/a Drebick Investments (Drebick), respectfully file this reply to the opposition to Petition for Writ of Certiorari (Opp.) filed by Respondent City of Olympia.

INTRODUCTION

Respondent argues that revenue raising measures imposed under a government's taxing authority, impact fees, "and other similar 'user fees' are not subject to constitutional takings analysis."[1] Opp. at 9-10. But, the fee assessed on Drebick's project as a condition to the issuance of a permit to build a new office building is an exaction; it is not a tax or a user fee. An exaction may require the dedication of land or a real property interest, the payment of fees, or the financing of public improvements. *See Village of Norwood v. Baker*, 172 U.S. 269, 279 (1898) (referring to an assessment against property for improvements to abutting road as an exaction). "Generally, any requirement that a developer provide or do something as a condition of receiving municipal approval is an exaction." Daniel S. Huffenus, Dolan *Meets* Nollan: *Towards a Workable Takings Test for Development Exactions Cases*, 4 N.Y.U. Envtl. L.J. 30, 33 (1995). This Court in *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005), reinforced the fact that "[a] distinct category of regulatory takings may occur when the government conditions the granting of permit approval, plat approval, or

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[1] Respondent incorrectly cites *New Castle Investments v. City of LaCenter*, 989 P.2d 569, 575 (Wash. Ct. App. 1999), for the proposition that "Washington courts have expressly acknowledged that impact fees are not regulatory, but are essentially revenue-raising taxes." Opp. at 11. What the *New Castle Investments* court said is "[w]e do not hold that these fees are taxes, but only that these fees do not fall within the vesting statute as 'land use control ordinances.'" 989 P.2d at 575.

some other type of governmental approval on an exaction from the approval-seeking landowner." *Town of Flower Mound v. Stafford Estates Ltd. P'ship*, 71 S.W.3d 18, 30 (Tex. Ct. App. 2002) (footnote omitted).

I

THIS COURT HAS NOT RULED ON EITHER OF THE IMPORTANT QUESTIONS OF FEDERAL TAKINGS LAW PRESENTED IN DREBICK'S PETITION

The nexus and rough proportionality tests set out in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), are important safeguards of private property rights. The critical role of these tests in regulatory takings law was recently affirmed in *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528. *Lingle* states that the nexus and rough proportionality standards form one of the four regulatory takings theories recognized by this Court. *Id.* at 548. *Lingle* was not an exactions case. Nor did the ruling in that case affect takings precedent related to exactions (also referred to as conditions of development). *See* Opp. 2-3 & nn.6-7, 11-14. "*Nollan* and *Dolan* cannot be characterized as applying the 'substantially advances' test we address today, and our decision should not be read to disturb these precedents." *Lingle*, 544 U.S. at 548.

The splits of authority described in Drebick's petition were not created by *Lingle* (*see* Opp. at 2). The debate among the lower courts regarding the scope of *Nollan* and *Dolan* has existed for years. *See, e.g.*, Richard Duane Faus, *Exactions, Impact Fees, and Dedications—Local Government Responses to* Nollan/Dolan *Takings Law Issues*, 29 Stetson L. Rev. 675, 704 (2000). *Lingle* did not resolve the questions presented in

this Petition, nor did any other decision of this Court.[2] *See* Opp. at 3 n.5.

Respondent argues that *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999), precludes the application of *Dolan* to a development fee. Opp. at 2-3 & n.5. But that case did not address the issue of excessive exactions. In *City of Monterey v. Del Monte Dunes*, this Court questioned the extension of *Dolan*'s rough proportionality test to permit denials. Rough proportionality is an unhelpful standard when addressing a permit denial. In *Dolan*, the standard made sense: the City there could calculate the traffic impact created by Mrs. Dolan's enlarged store and it could assess the proportionate amount by which a bicycle trail could reduce the impact. But such an approach is not useful in assessing whether a permit denial fails to substantially advance a legitimate governmental interest—after all, how does one determine whether a permit denial is roughly proportional to anything? As this Court said, the proportionality standard

> was not designed to address, and is not readily applicable to, the much different questions arising where, as here, the landowner's challenge is *based not on excessive exactions but on denial of development.* We believe, accordingly, that the rough-proportionality test of *Dolan* is inapposite to a case such as this one.

City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. at 703 (emphasis added).

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[2] Respondent also includes several cites to *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), and *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002). Neither was an exactions case and neither discussed the applicability of *Nollan* or *Dolan* to the various sorts of conditions on development (fees vs. dedications of land; legislative vs. individually or adjudicatively imposed exactions).

See City of Olympia v. Drebick, 83 P.3d 443, 451 (Wash. Ct. App. 2004) ("[A] *Dolan* proportionality analysis was inapposite in *Del Monte Dunes* because the government did not exact land or money.").

II

RESPONDENT'S OPPOSITION ILLUMINATES THE ISSUES THAT CREATE A NATIONWIDE SPLIT OF AUTHORITY AMONG THE LOWER COURTS

The split of authority described in the Petition exists because some courts seek to limit *Nollan* and *Dolan* to their facts, and other courts conclude that *Nollan* and *Dolan* advance broader constitutional takings principles intended to prevent a minority of citizens from shouldering a disproportionate share of public burdens. While the specific facts of both *Nollan* and *Dolan* related to the transfer of real property, there is no consensus about whether the nexus and rough proportionality standards should be limited to such transfers of real property or, as Respondent argues, the "direct analog of a dedication requirement." Opp. at 24. As the recipient of moneys exacted from property owners, Respondent naturally argues that the Court should limit the scope of *Nollan* and *Dolan*.

The cases cited by Respondent do not support its claim that lower courts have only expanded *Dolan*'s rough proportionality analysis to monetary exactions that are a direct analog of a dedication requirement. *See* Opp. at 24-25. The Oregon Court of Appeals, in *Dudek v. Umatilla County*, 69 P.3d 751, 757 (Or. Ct. App. 2003), admitted that "the question of under what circumstances the heightened scrutiny imposed by *Dolan* applies to exactions that are monetary in nature is a complex question and is not completely resolved." The *Dudek* court concluded that it was not necessary to resolve the question of *Dolan*'s application to pure monetary exactions in that case. *Dudek*, 69 P.3d at 758. Nor has the California Supreme Court

limited the applicability of *Nollan* and *Dolan* to a narrow range of development fees intended as an alternative to the dedication of real property. In *Ehrlich v. City of Culver City*, 911 P.2d 429, 449 (Cal. 1996), the court found that the City of Culver City could not require the property owner to dedicate property to replace lost private recreational facilities. However, the City could mitigate the loss of a specific recreational facility by requiring a fee to defray the expenses involved in "attracting the development of comparable private recreational facilities for [the city's] residents." *Id.* at 450. The court applied the *Nollan* and *Dolan* standards to the development fee in *Ehrlich*, explaining that "it matters little whether the local land use permit authority demands the actual *conveyance* of property or the *payment* of a monetary exaction." *Ehrlich v. City of Culver City*, 911 P.2d at 444.

Respondent makes the remarkable claim that no federal or state court has ever applied *Nollan* and *Dolan* to legislatively adopted, generally applicable impact fees. Opp. at 14. That is simply not true. Drebick discusses five courts that have met or exceeded the heightened scrutiny required by *Nollan and Dolan* when deciding the constitutionality of legislatively imposed exactions. Petition at 16-17. The most recent and well-reasoned decision on the issue came from the Supreme Court of Texas. Although the Texas court refused to adopt a bright line rule in *Town of Flower Mound v. Stafford Estates Ltd. P'ship*, 135 S.W.3d 620, 642 (Tex. 2004), it applied a nexus and rough proportionality analysis to the fee at issue in that case. The fee was legislatively adopted (pursuant to the Town's Land Development Code), and it was applicable to all builders and developers as a condition of development. *Id.* at 623-24.

The decisions in *Town of Flower Mound* and the others cited in the Petition are entirely consistent with this Court's decision in *Dolan*. All but one of the cases relied on by the *Dolan* majority in formulating the "rough proportionality" test involved municipal ordinances—legislation of general

applicability—requiring developers to dedicate property or cash to help finance the construction of public facilities. *See Dolan v. City of Tigard*, 512 U.S. at 400 (Stevens, J., dissenting). "In assessing the legality of the conditions, the courts gave no indication that the transfer of an interest in realty was any more objectionable than a cash payment." *Id.* And see Petition at 27, explaining that both *Nollan* and *Dolan* involved a mixture of legislative and adjudicative government action.

III

LOCAL GOVERNMENTS MUST MEET THE *NOLLAN* AND *DOLAN* STANDARDS FOR ALL DEVELOPMENT EXACTIONS, REGARDLESS OF THE FORM OF THE EXACTION OR THE MANNER BY WHICH IT IS IMPOSED

Respondent argues that impact fee ordinances have "built-in protections to prevent the kind of extraordinary practices that concern Drebick, and to ensure compliance with constitutional standards." Opp. at 22-23. Yet, throughout its Opposition, Respondent discusses standards that do not ensure compliance with the federal constitutional standards set by *Nollan* and *Dolan*. Respondent advocates standards that require new development to pay a share of the cost of new facilities necessitated by all new development regardless of the impact of a single new development project on public facilities (Opp. at 4, 6-7 & n.13), and claims, without citation, that local governments generally require that the fees they impose bear a reasonable relationship to the development seeking approval (Opp. at 23). These sorts of "built-in protections" do not protect property owners from the kind of extortionate exactions that this Court described in *Nollan* and *Dolan*.

> Absent judicial enforcement of the takings clause, governments have every incentive to take private property without compensation. Democracy will deter such wealth redistribution only when large

> numbers of people are likely to bear the costs. The takings clause exists, along with the rest of the Bill of Rights, because the constitutional framers understood the inevitability of the tyranny of the majority in an unlimited democracy.

James L. Huffman, *Colloquium on* Dolan v. City of Tigard: *The Takings Clause Doctrine of the Supreme Court and the Federal Circuit:* Dolan v. City of Tigard: *Another Step in the Right Direction*, 25 Envtl. L. 143, 146 (1995) (footnote omitted).

CONCLUSION

For these reasons the petition should be granted.

DATED: September, 2006.

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No. 06-223

In The
Supreme Court of the United States

JOHN DREBICK and JANE DOE DREBICK,
husband and wife, d/b/a DREBICK INVESTMENTS,

Petitioners,

v.

CITY OF OLYMPIA, a Washington code city,

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court Of Washington

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF BUILDING INDUSTRY ASSOCIATION OF WASHINGTON IN SUPPORT OF PETITIONER JOHN AND JANE DOE DREBICK

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Supreme Court Rule 37.2(b), the Building Industry Association of Washington (BIAW) moves to file the attached brief in support of the Petition for Writ of Certiorari. Consent has been received by Petitioner and that consent has been lodged with this Court. Respondent, however, has withheld consent thus necessitating the filing of this motion.

BIAW seeks to augment Petitioner-Drebick's arguments by illustrating that there is a wide split of authority among the lower state and federal courts over the question of whether legislatively imposed exactions and monetary exactions are subject to the "essential nexus" and "roughly proportional" standards enunciated by this Court in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1994) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). In addition, BIAW seeks to inform this Court of the copious scholarly commentary on the subject of extending *Nollan* and *Dolan's* standards to legislatively imposed exactions and monetary exactions. BIAW also seeks to demonstrate that unfair and disproportionate exactions can, and do, occur whether they are imposed legislatively or adjudicatively or whether such exactions include a dedication of land or are monetary in nature.

The opinion below holds that the heightened scrutiny set forth by this Court in *Dolan* is not applicable to legislatively imposed monetary exactions. As a result, the lower court's ruling stands for the proposition that when monetary conditions are imposed legislatively on property owners, the conditions need not be roughly proportional to the impact created by the proposed development. The

accompanying brief of amicus curiae suggests that this is a serious conflict that should be resolved by this Court.

For these reasons, BIAW respectfully requests permission to file the attached brief amicus curiae.

DATED: September 13, 2006

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INTEREST OF AMICUS[1]

BIAW is Washington's largest trade association, with 12,254 members representing over 350,000 citizens who work in various trades associated with the development and construction of residential housing. BIAW members routinely are required to pay monetary exactions, such as the traffic impact fees at issue in this case, as a condition of receiving subdivision approval. BIAW has a substantial interest and stake in the determination of whether such fees must be "roughly proportional" to the impact caused by the proposed development.

STATEMENT OF THE CASE

This case involves the appropriate judicial scrutiny that should be applied to legislatively-imposed monetary exactions. An exaction is a demand that a property owner give up something of value – whether it is land, an interest in private property, or money – as a condition to obtaining permits or other governmental approvals to build on one's property.

The type of exaction involved in this case is an impact fee. Impact fees are imposed by local governments on developers and landowners as a condition of new development in order to generate revenue for infrastructure allegedly necessitated by the new development. Impact

[1] Pursuant to Supreme Court Rule 37(6), counsel for amicus authored the brief in whole. Amicus solely funded the preparation and filing of this brief. Respondent – City of Olympia requested that BIAW include a copy of Respondent's refusal letter with the submission of its brief. A copy is submitted herewith.

fees have been an increasingly popular way for governments to raise revenue in lieu of taxes.

In this case, John Drebick and Jane Doe Drebick, d/b/a Drebick Investments (Drebick), constructed a 54,000 square-foot office building in Olympia, Washington. As a condition for approval of the project and issuance of building permits, Drebick was required to pay a total of $132,328.98 as a transportation impact fee. The impact fee was calculated according to the City's legislatively adopted fee schedule. *See* Petition for Certiorari, App. at A-1. The impact fee was "based upon [the] contemplated cost of citywide traffic projects without regard to the specific impact the Drebick development might or might not have on any proposed project . . . " Pet. for Cert., App. at A-21.

Under this Court's precedent in *Dolan v. City of Tigard,* Drebick contends that the traffic impact fee is not related in "extent to the impact of the proposed development." 512 U.S. at 391.

The court below stated that the heightened standard of judicial scrutiny set forth in both *Nollan v. California Coastal Commission*, 483 U.S. 825 (1994) and *Dolan* requiring that exactions be roughly proportional to the impact caused by the proposed development, was not triggered because the fees were uniformly applied under the authority of previously adopted legislation. Specifically, the court argued that "neither *Nollan* nor *Dolan* concerned the imposition of impact fees but addressed instead the authority of a local government to condition development approval on a property owner's dedication of a portion of land for public use." Pet. for Cert., App. at A-11 – A-12. In addition, the court stated that "neither the

United States Supreme Court nor this court has determined that the tests applied in *Nollan* and *Dolan* to evaluate land exactions must be extended to the consideration of fees imposed to mitigate the direct impacts of a new development, much less to the consideration of more general growth impact fees imposed pursuant to statutorily authorized local ordinance." Pet. for Cert., App. at A-12.

The issue presented for this Court's resolution is whether the applicability of the Constitutional protections established in *Nollan* and *Dolan* can be so easily circumvented.

REASONS FOR GRANTING THE WRIT

Supreme Court Rule 10.1(b) lists among the considerations governing review on certiorari the circumstance when a state court of last resort has decided a federal question in a way that conflicts with another state court of last resort, or with a United States court of appeals. Rule 10(c) also includes as a ground for review when a state court of last resort has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court. Both of these grounds for review are present in this case.

I

THERE IS A SPLIT AMONG STATE AND FEDERAL COURTS THAT SHOULD BE SETTLED BY THIS COURT

Lower courts have interpreted *Dolan* in an inconsistent manner, thus creating a nationwide split of authority as to whether *Dolan's* rough proportionality test applies to legislatively imposed exactions and/or monetary exactions.

One current sitting Justice and one former Justice of this Court have acknowledged the "conflict" over whether *Dolan's* test should be applied to legislatively imposed exactions. *See Parking Association of Georgia, Inc. v. City of Atlanta*, 515 U.S. 1116, 1118 (1995) (Thomas, J., and O'Connor, J., dissenting from denial of certiorari) (stating that "the lower courts should not have to struggle" with this issue.).

Both scholars and the courts have identified the significant "split of authority" clouding this issue. *See, e.g.*, Pensley, D.S., *Real Cities, Ideal Cities: Proposing A Test of Intrinsic Fairness for Contested Development Exactions*, 91 CORNELL L. REV. 699, 705 (2006) (noting the confusion caused by the varying application of *Nollan/Dolan's* test to legislative v. adjudicative and monetary exactions by the courts); Faus, Richard Duane, *Exactions, Impact Fees, and Dedications: Local Government Responses to* Nollan/ Dolan *Takings Law Issues*, 29 STETSON L. REV. 675, 693-701 (2000) (recognizing a "nationwide split of authority" on whether the *Dolan* test applies to legislatively enacted, uniformly applied impact fees); Reznik, Inna, *The Distinction Between Legislative and Adjudicative Decisions in* Dolan v. City of Tigard, 75 N.Y.U. L. REV. 242, 256-57 (2000) ("There is considerable disagreement over whether

legislative decisions are subject to *Dolan's* heightened scrutiny review"); *see also Garneau v. City of Seattle*, 147 F.3d 802, 811 (9th Cir. 1998) (there is "considerable doubt" about the applicability of the *Dolan* rough proportionality test to "legislative, as opposed to administrative exactions."); *Home Builders Association of Central Arizona v. City of Scottsdale,* 930 P.2d 993, 1000 (Ariz. 1997) (the question "has not been settled"); *Rogers Machinery, Inc. v. Washington County*, 45 P.3d 966, 976 (Or. Ct. App. 2002), *cert. denied*, 538 U.S. 906 (2003) (A "split of authority exists in lower courts as to whether *Dolan* is limited to development conditions imposed through adjudicatory decisions or whether it extends to those imposed as a result of generally applicable legislation").

A review of the lower courts dealing with the issue of whether *Dolan* is limited to adjudicatively imposed exactions, reveals the wide split of authority. On the one hand, a number of federal and state courts have applied *Nollan/Dolan's* heightened scrutiny to legislatively imposed exactions. *See, e.g., City of Portsmouth v. Schlesinger*, 57 F.3d 12, 16 (1st Cir. 1995) (*Dolan* analysis applied to impact fee imposed by ordinance); *National Association of Home Builders of the United States v. Chesterfield County*, 907 F. Supp. 166, 167 (E.D. Va. 1995), *aff'd*, 92 F.3d 1180 (4th Cir. 1996) (*Dolan* applied to a county policy to guide the county's acceptance of proffers); *Curtis v. Town of South Thomaston*, 708 A.2d 657, 660 (Me. 1998) (*Dolan* applied to fire protection ordinance requiring developers to construct fire pond); *Manocherian v. Lenox Hill Hospital*, 643 N.E.2d 479 (N.Y. 1994), *cert. denied*, 514 U.S. 1109 (1995) (*Nollan* applied to statute requiring apartment owners to renew certain leases with non-private hospital employees); *Trimen Development Company v. King County*,

877 P.2d 187, 191 (Wash. 1994) (*Dolan* applicable to ordinance imposing park development fees).

On the other hand, a number of state courts have held *Dolan's* heightened review is inapplicable to legislatively imposed exactions. *See, e.g., Homebuilders Association v. City of Scottsdale,* 930 P.2d 993, 1000 (Ariz. 1997) (*Dolan's* rough proportionality test does not apply to water service fee enacted by ordinance and uniformly applied to all properties); *Ehrlich v. City of Culver City*, 911 P.2d 429, 444 (Cal. 1996), *cert. denied*, 519 U.S. 929 (1996); (*Dolan* inapplicable to fees imposed legislatively); *Krupp v. Breckenridge Sanitation District*, 19 P.3d 687 (Colo. 2001) (*Dolan* inapplicable to sanitation district fee imposed legislatively); *Parking Association of Georgia v. City of Atlanta*, 450 S.E.2d 200, 203 (Ga. 1994), *cert. denied*, 515 U.S. 1116 (1995) (ordinance imposing parking lot standards upon parking lot owners held not to violate *Dolan* because it was a legislative determination); *Southeast Cass Water Resource District v. Burlington Northern R. Co.*, 527 N.W.2d 884, 885 (N.D. 1995) (*Dolan* not applicable to requirement that railroad pay costs for alterations of bridge and culverts because imposed under legislative enactment); *Waters Landing Limited Partnership v. Montgomery County*, 650 A.2d 712, 724 (Md. 1994) (*Dolan* inapplicable to development impact fees); *Arcadia Development Corp. v. City of Bloomington*, 552 N.W.2d 281, 286 (Minn. 1996) (*Dolan* inapplicable to ordinance requiring mobile home park owners to close their parks to pay relocation cots to park residents); *Rogers Machinery*, 45 P.3d at 967, 982 (*Dolan* inapplicable to traffic impact fee assessed by ordinance).

To further illustrate the varying applicability of the *Nollan/Dolan* standards by the lower courts, some jurisdictions have applied heightened scrutiny to impact fees that are imposed adjudicatively, as opposed to fees imposed legislatively. *See, e.g.*, Ball, Carlos A. & Reynolds, Laurie, *Exactions and Burden Distribution in Takings Law*, 47 WM. & MARY L. REV. 1513, 1559-60 (2006) (Lower courts have "disagreed widely" on whether *Nollan/ Dolan's* heightened scrutiny applies to legislatively imposed exactions and to monetary exactions); *see also Ehrlich v. City of Culver City*, 911 P.2d at 464-65 (holding that *Nollan* and *Dolan's* "essential nexus" and "rough proportionality" tests apply to adjudicatively imposed exactions); *San Remo Hotel L.P. v. City of San Francisco*, 41 P.3d 87, 105-06 (Cal. 2002) (Court refusing to apply *Nollan/Dolan's* standards to legislative impact fee).

Yet another set of courts have applied *Nollan/Dolan's* test to impact fees without distinguishing between legislative and adjudicative exactions. *See, e.g., Town of Flower Mound v. Stafford Estates Limited Partnership*, 135 S.W.3d 620, 642 (Tex. 2004) (court holding that *Dolan* applies to both "a dedication of property to the public and a requirement that property already owned by the public be improved" while declining "to adopt a bright-line adjudicative/ legislative distinction"); *Home Builders Association of Dayton & the Miami Valley v. City of Beavercreek*, 729 N.E.2d 349, 353 (Ohio 2000) (*Dolan's* "rough proportionality" test applicable to ordinance imposing impact fees); *Northern Illinois Home Builders Association, Inc. v. County of Du Page*, 649 N.E.2d 384, 388-89 (Ill. 1995) (*Dolan* applied to transportation impact fee ordinance).

The confusion caused by this wide split of authority has led to copious law review articles calling on this Court

to provide clarity in order to prevent this issue from continuing to percolate in the lower courts. *See* Reynolds, Laurie & Ball, Carlos A., *Exactions and the Privatization of the Public Sphere,* 21 J.L. & POL. 451, 451 (2005) ("Of the extensive scholarly commentary spawned by the Supreme Court's jurisprudence, the critique of the exactions branch of the Takings Clause doctrine is rich and voluminous"); Ball & Reynolds, 47 WM. & MARY L. REV. at 1519 (authors urging this Court to "extend *Nollan* and *Dolan* to all local government exactions"); Reznik, *supra,* at 267 (arguing that it is time to "reconsider the effectiveness of *Dolan's* legislative/adjudicative distinction"); Breemer, J. David, *The Evolution of the "Essential Nexus": How State and Federal Courts Have Applied* Nollan *and* Dolan *and Where They Should Go from Here,* 59 WASH. & LEE L. REV. 373 (2002) (arguing that *Nollan* and *Dolan* should be applied to both legislative and monetary exactions); Pensley, D.S., *supra,* at 704 (asserting "there is no principled basis for giving greater deference to exactions imposed through legislative enactment than those to imposed through adjudication"); Callies, David L., *Regulatory Takings and the Supreme Court: How Perspectives on Property Rights Have Changed from* Penn Central *to* Dolan, *and What State and Federal Courts Are Doing About It,* 28 STETSON L. REV. 523, 571 (1999) (arguing that it is "difficult to make out a case for limiting *Nollan/Dolan* to dedications only").

These cases and legal commentary reflect the confusion over whether *Dolan's* rough proportionality test should be applied to legislative or adjudicative land use decisions, and whether it applies to dedications of land and/or monetary exactions. The effect is that in some jurisdictions, lower courts will apply the *Dolan* heightened

scrutiny to legislatively imposed exactions, while in other jurisdictions a less stringent review is applied to similar exactions. Likewise, in some jurisdictions, lower courts will apply *Dolan's* standards to monetary exactions while other jurisdictions will abstain from doing so. This inconsistent application of *Dolan* results in incongruous application of the federal constitution. Property owners seeking government permits, regardless of the state where they reside, are entitled to have their federal constitutional rights consistently and fully protected. The time is ripe for this Court to provide the lower courts with necessary guidance on this issue.

II

WHETHER THE *DOLAN* "ROUGH PROPORTIONALITY" STANDARD APPLIES TO LEGISLATIVELY IMPOSED MONETARY EXACTIONS PRESENTS AN IMPORTANT QUESTION OF REGULATORY TAKINGS LAW

The Takings Clause of the Fifth Amendment of the United States Constitution, made applicable to the States through the Fourteenth Amendment, *Chicago, B. & Q.R. Co. v. Chicago*, 166 U.S. 226, 236 (1897), provides: "[N]or shall private property be taken for public use, without just compensation." U.S. Const. amend. V. The principal purpose of the Takings Clause is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

This Court has established a special subset to regulatory takings law when the government conditions the granting of permit approval on an exaction:

> Under the well-settled doctrine of "unconstitutional conditions," the government may not require a person to give up a constitutional right – here the right to receive just compensation when property is taken for a public use – in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property.

Dolan, 512 U.S. at 385.

As succinctly put by Justice Harlan over 100 years ago:

> In our judgment, the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking, under the guise of taxation, of private property for public use without compensation.

Village of Norwood v. Baker, 172 U.S. 269, 279 (1898).

This Court has formulated a two-part test for use in determining whether an exaction constitutes an impermissible taking. First, the court determines whether an essential nexus exists between a legitimate state interest and the condition exacted by the government. *Nollan*, 483 U.S. at 836. If an essential nexus exists, the court must decide the required degree of connection between the exaction and the projected impact of the proposed development. *Dolan*, 512 U.S. at 386-88. No precise mathematical calculation is required, but the government must make

some sort of individualized determination that the exaction is roughly proportional in both nature and extent to the proposed impact of the proposed development. *Id.* at 391.

Under *Dolan*, the burden of proof to justify the exaction is on the government, not the property owner. 512 at 374, n.8. The test set forth in *Dolan* is important because its "rough proportionality" test elevates the level of scrutiny courts must give to exactions and prevents governments from leveraging permit approval on illegal exactions. Unfortunately, as noted above, it is not abundantly clear which courts will apply *Dolan* to legislatively imposed exactions or monetary exactions. This is an important question of federal law which has not been, but should be, settled by this Court.

The outcome of this case will have an impact on anyone who is subject to a legislatively authorized exaction or monetary exaction, such as an impact fee. In turn, this case would likely affect the majority of developers and purchasers of new homes in this nation. Impact fees can range from several hundred dollars to tens of thousands of dollars per home or building. *Impact Fee Handbook* (National Association of Home Builders), 1997 at 2. A study shows that impact fees and regulatory costs account for a nationwide average of 4.5 percent of the cost of a new home. George Avalos, *Tangle of Red Tape Inflates Costs for Homebuyers in the East Bay*, CONTRA COSTA TIMES, Sept. 29, 2002. An example in the San Francisco area reflects the effect burdensome exactions can have on housing affordability. In Livermore, California building exactions have topped $100,000 per house. HBA News, *City of Livermore Tops $100,000 in Home Building Fees*, July/August 2002 at 14. Because such fees become part of the

purchase price, the detrimental effect it has on housing affordability is staggering.

As governments continue to face economic challenges of generating additional revenue to fund needed infrastructure without raising taxes, the trend will be for more local jurisdictions to impose such exactions in increasing amounts. Amicus BIAW is concerned that without applying *Dolan's* heightened scrutiny, governmental bodies will be able to shift the responsibility for funding general improvements onto a discrete segment of the public. The *Dolan* rough proportionality test ensures that the cost of such exactions does not exceed the development's fair share of the cost of improvements.

Another measure of the importance of this case is the amount of litigation that has already taken place on this issue and the amount of legal commentary discussing the issue. The current uncertainty over what standard of review governs such exactions benefits no one. Both developers and governmental bodies deserve to know the appropriate standard of review for determining when an exaction is an unconstitutional taking.

The issue presented in this case involves a substantial federal question involving regulatory takings. The resolution of this issue has far reaching effects and therefore should be addressed by this Court.

III

DOLAN'S HEIGHTENED SCRUTINY SHOULD BE APPLIED TO LEGISLATIVELY IMPOSED MONETARY EXACTIONS

The question presented is whether the "rough proportionality" standard announced in *Dolan* applies to the exaction in this case. Amicus contends that it does apply because there is no principled basis for distinguishing between legislative versus adjudicative land use decisions, or monetary versus dedicatory exactions.

Courts limiting the application of the "rough proportionality" standard to purely adjudicative exactions, as opposed to legislatively authorized exactions, reason that the risk of municipal "extortion" is much greater in the adjudicative context. *See San Remo*, 41 P.3d at 102-104; *see also Home Builders Association of Central Arizona*, 930 P.2d at 1000. More specifically, these courts rationalize that the legislative and political processes have more protections in place for landowners from such abuses by government. This reasoning is flawed. *See* Ball & Reynolds, *supra*, at 1564 (the legislative-adjudicative "distinction serves as a poor proxy for the existence of improper leveraging on the part of the government"); Pensley, *supra*, at 704 ("[B]ecause in all practicality legislative and adjudicative land use decisions are indistinguishable, any judicial attempt to rubber stamp ostensible legislative actions is flawed"); Breemer, *supra*, at 396 ("There is . . . no compelling reason to avoid applying *Nollan* and *Dolan* to all exactions"); and Reznik, *supra*, at 280 (the legislative-adjudicative "distinction fails to address the policy problems Dolan intended to solve: coercive and unfair government behavior").

There is no basis for the rationale that legislative and political processes provide more protection to property developers. First, due process does not apply to legislative enactments so landowners or future potential developers are entitled to no notice of proposed impact fee legislation. *See* Pensley, *supra*, at 706 ("Procedural due process in the land use context is required only for administrative or quasi-judicial decision-making [and] does not apply to legislative decision-making").

Second, unlike the distinct Constitutional divisions between federal and state levels, no such demarcation exists at the local level. *See* Ball & Reynolds, *supra*, at 1562 (The "marked division of governmental functions that is constitutionally required at the federal and state levels is often absent at the local level"). The Texas Supreme Court is unconvinced "that a workable distinction can [] be drawn between actions denominated adjudicative and legislative." *Flower Mound*, 135 S.W.3d at 641.

As a result of this blurred line between legislative and adjudicative decision-making, majority oppression can occur when locally elected officials abide by the anti-development sentiment of the electorate. Yet, *Dolan* was aimed at protecting developers from this type of "majority oppression." *See* Reznik, *supra*, at 270-01 (arguing that legislative land use decisions made at the local level may reflect majoritarianism oppression). The correct application of the *Dolan* test to all exactions protects those minority interests.

Exactions can be imposed unfairly and disproportionately through legislation or on an individual basis. Applying *Dolan* to one form of government action, but not the

other, does not make doctrinal sense. The threat of leveraging discussed in *Dolan* is just as likely to occur in legislative decision making processes as in adjudicative settings. Because both types of exactions involve conditioning governmental land use approval and present the same opportunities for governmental "leveraging," the constitutional protection should be consistently applied.

As Justice Thomas noted in *Parking Association of Georgia:*

> It is not clear why the existence of a taking should turn on the type of governmental entity responsible for the taking. A city council can take property just as well as a planning commission can. Moreover, the general applicability of the ordinance should not be relevant in a takings analysis. If Atlanta had seized several hundred homes in order to build a freeway, there would be no doubt that Atlanta had taken property. The distinction between sweeping legislative takings and particularized administrative takings appears to be a distinction without a constitutional difference.

515 U.S. at 1117-18. A subsequent Illinois state court decision agreed with Justice Thomas's viewpoint. *Amoco Oil Company v. Village of Schaumburg*, 661 N.E.2d 380 (Ill. 1996). That court said, "Certainly, a municipality should not be able to insulate itself from a taking challenge merely by utilizing a different bureaucratic vehicle when expropriating its citizen's property." *Id.* at 390.

The *Dolan* test balances the competing interests of both developers and government and should be applied to all types of exactions. The Supreme Court of Ohio explained such competing interests in holding that *Dolan*

was applicable to legislatively imposed impact fee ordinance for funding roadway improvements:

> We believe this test [*Dolan*] will adequately balance the interests of local governments with those of property owners. The first prong of the test decides whether the ordinance is an appropriate method to address the city's stated interests, and the second prong assures that the city and developers are paying their proportionate share of the cost of new construction.

City of Beavercreek, 729 N.E.2d at 356.

More recently, the Texas Supreme Court said:

> While we recognize that an ad hoc decision is more likely to constitute a taking than general legislation, we think it entirely possible that the government could "gang up" on particular groups to force extractions that a majority of constituents would not only tolerate but applaud, so long as burdens they would otherwise bear were shifted to others.

Flower Mound, 135 S.W.3d at 641.

The case now at bar presents a good example of what happens when *Dolan's* rough proportionality test is held inapplicable to a monetary exaction imposed legislatively. Drebick is saddled with paying significantly more than the proportionate share of the cost that the development will have on traffic. The lower court's decision thus creates a loophole for governments to avoid having to comply with *Nollan/Dolan*. Under the decision below, government entities can use their "leveraging" authority through legislation instead of the adjudicative process to insulate

themselves from liability under the Constitution. The Fifth Amendment does not allow such an exemption.

CONCLUSION

Whether *Dolan's* "rough proportionality" standard applies to all legislatively imposed exactions is an issue needing definitive resolution by this Court as evidenced by the split of authority across the nation on this issue. Until this Court resolves this substantial federal question concerning regulatory takings law, the *Dolan* standard will continue to be inconsistently applied across the nation by state and federal courts. Amicus respectfully urge this Court to grant the petition for writ of certiorari and reverse the judgment of the Washington Supreme Court.

Respectfully submitted,

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MOTION FILED
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No. 06-223

In The
Supreme Court of the United States

JOHN DREBICK and JANE DOE DREBICK,
husband and wife, d/b/a DREBICK INVESTMENTS,

Petitioners,

v.

CITY OF OLYMPIA, a Washington code City,

Respondent.

On Petition For A Writ Of Certiorari
To The Washington Supreme Court

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICI CURIAE OF THE MASTER BUILDERS ASSOCIATION OF PIERCE COUNTY IN SUPPORT OF PETITIONERS JOHN DREBICK AND JANE DOE DREBICK, HUSBAND AND WIFE, D/B/A DREBICK INVESTMENTS

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Supreme Court Rule 37.2(b), the Master Builders Association of Pierce County (Washington State) (hereinafter "MBA") moves to file the attached brief in support of the Petition for Writ of Certiorari. Consent has been given by Petitioner and that consent will be lodged with this Court. Respondent, however, has withheld consent thus necessitating the filing of this motion.

MBA seeks to supplement Petitioner-Drebick's arguments by illustrating that there is a wide split of authority among the lower state and federal courts over the question of whether legislatively imposed exactions and monetary exactions are subject to the "essential nexus" and "roughly proportional" standards enunciated by this Court in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1994) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

MBA also seeks to demonstrate that unfair and disproportionate exactions can, and do, occur whether they are imposed legislatively or adjudicatively or whether such exactions include a dedication of land or are monetary in nature.

The opinion below holds that the heightened scrutiny set forth by this Court in *Dolan* is not applicable to legislatively imposed monetary exactions. As a result, the lower court's ruling stands for the proposition that when monetary conditions are imposed legislatively on property owners, the conditions need not be roughly proportional to the impact created by the proposed development. The accompanying brief of amicus curiae suggests that this is a serious conflict that should be resolved by this Court. For

these reasons, MBA respectfully requests permission to file the attached brief amicus curiae.

DATED: September 13, 2006

Respectfully submitted,

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I. INTERESTS OF AMICI CURIAE[1]

The Master Builders Association of Pierce County is a "not-for-profit" corporation organized under the laws of the State of Washington. The Master Builders Association of Pierce County (MBA) consists of nearly two thousand home building professionals and related service providers. The MBA promotes the interests of the home building industry through membership involvement, legislative action, networking and education while maintaining the highest ethical standards.[2]

The MBA actively challenges impact fee abuse issues such as the fee which is the subject of this case. For example, on February 28, 2006 the City of Bonney Lake, Washington within Pierce County voted to increase park impact fees from $2000 per single family lot to $2893 per lot. MBA provided testimony twice in opposition to the increase.

The City of Puyallup, Washington within Pierce County recently increased its park impact fees from $491 SF/$323 MF to $2300 for both Single Family and Multi-family units. The City of Puyallup also adopted a road impact fee at $3030 per Single Family unit. The MBA opposed these huge increases.

In addition, the Master Builders Association of Pierce County is one of fifteen local homebuilders associations under the umbrella of the Building Industry Association of Washington (BIAW) representing more than 12,254

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[1] Pursuant to Supreme Court Rule 37(6), counsel of amicus authored the brief in whole. Amicus solely funded the preparation and filing of this brief.

[2] The Master Builders Association of Pierce County's Vision Statement is

1. Be the leader and advocate of affordable housing.
2. Be a strong and financially viable association.
3. Provide tangible membership values.
4. Maintain a positive public image.

member companies who are threatened by onerous regulations. BIAW works to reduce the scope of government and expand free enterprise. BIAW submitted an amicus curiae brief in this present case before the Court of Appeals and the Washington State Supreme Court.[3]

The MBA Amici's interests lie in countering local governments' funding needs with the needs of the new home buyer for affordable shelter. Local jurisdictions in Washington State continue to increase impact fees used to fund facilities and services used by the public in general but charged to an isolated segment of the population – the development community.

Heightened scrutiny applied to such fees would demonstrate to an apprehensive home buyer that the fee paid directly mitigated the impact from the new home. Additionally, a 10-20% miscalculation could result in significant savings. According to the National Association of Home Builders, even a $1,000 increase in the purchase price of a home can force 21,000 potential buyers out of the market. *The Truth About Regulations and the Cost of Housing* (NAHB, 1995) p. 6

II. REASONS FOR GRANTING THE PETITION

The Court should accept certiorari for at least the following reasons. First, pursuant to Supreme Court Rule 10.1(b), review is supported when a state court of last resort has decided a federal question in a way that conflicts with another state court of last resort, or with a United States court of appeals.

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[3] The Building Industry Association of Washington Mission Statement declares that "The Building Industry Association of Washington is the voice of the housing industry in the state of Washington. The Association is dedicated to ensuring and enhancing the vitality of the building industry for the benefit of its members and the housing needs of the citizens." To accomplish this purpose, the Association's primary focus is to interact with the Legislative, Regulatory, Judicial and Executive Agencies of Washington's government.

Second, Supreme Court Rule 10(c) provides for review when a state court of last resort has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court. Both grounds support review of this case.

Certiorari should be granted to clarify the well-established conflict in various state and federal courts regarding whether the standard articulated in *Dolan v. City of Tigard,* 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994) (hereinafter "*Dolan*") applies to legislatively enacted monetary exactions and whether public agencies possess a compensable property interest in maintaining the perpetuation of land-use designations.

Monetary exactions or fees should be held to the same level of scrutiny as those involving dedications. If monetary exactions receive less scrutiny, local governments can impose onerous fees on one population segment (the development community) for facilities or services which serve the general community as a whole, and avoid the requirement of establishing a nexus between the event triggering the exaction and the resulting fee. The law does not permit public agencies to do indirectly what it does not permit them to do directly.

Additionally, there remains a heightened risk of disproportionality and/or extortion for legislatively authorized fees. Legislative acts do not enjoy absolute deference to the extent that constitutional protections be abandoned. The Constitution applies equally to legislative as well as adjudicative acts.

Nor is the political process adequate protection against legislative abuse. When legislatively applied, notice is not required or often provides to the targeted fee payor, the payor may not yet be invested in the issue (as in the case of fee imposed on ***future*** home buyers), and if applied to an isolated segment, the balance of the voting constituents likely will not object.

III. ARGUMENT

A. CERTIORARI SHOULD BE GRANTED TO RESOLVE IMPORTANT ISSUES AS TO WHICH THERE IS A WELL-ESTABLISHED CONFLICT AMONGST STATE AND FEDERAL COURTS

1. State And Federal Courts Are Split As To Whether *Dolan* Applies To Monetary Exactions As Well As Dedications.

There is a well-developed split on whether *Dolan* extends heightened scrutiny solely to permit conditions that require the dedication of real property and the concomitant loss of the right to exclude, or whether *Dolan* applies to monetary exactions as well.

Courts that have applied, or approved of applying a heightened scrutiny to development fees include state cases such as *Ehrlich v. City of Culver City,* 911 P.2d 429 (1996) (hereinafter "*Ehrlich*"); *Northern Illinois Home Builders Association, Inc. v. County of Du Page,* 649 N.E.2d 384 (Ill. 1995); *Home Builders Association of Central Arizona v. City of Scottsdale,* 902 P.2d 1347 (Ariz. 1995); *Trimen Development Company v. King County,* 877 P.2d 187 (Wash. 1994); *College Station v. Turtle Rock,* 680 S.W.2d 802 (Tex. 1984); *Collis v. Bloomington,* 246 N.W.2d 19 (1976); *Jenad, Inc. v. Scarsdale,* 218 N.E.2d 673 (N.Y. 1966), and *Remmenga v. California Coastal Comm'n,* 163 Cal.App.3d 623, 628 (1985).

At least two federal cases have suggested that *Dolan* is relevant in assessing impact fees. *City of Portsmouth v. Schlesinger,* 57 F.3d 12 (1st Cir. 1995) (relying in part on *Dolan* to strike down an affordable housing impact fee); *National Association of Home Builders v. Chesterfield County,* 907 F.Supp. 166, 168 (E.D. Va. 1995), *aff'd,* at 1996 U.S. App. LEXIS 18838 (4th Cir. July 30, 1996).

Conversely, some state courts have either directly limited *Dolan*'s applicability to dedications, or implied such is true. *McCarthy v. City of Leawood,* 894 P.2d 836 (Kan. 1995); *Blue Jeans Equities West v. City and County*

of San Francisco, 221 Cal.App.3d 1072 (1992). So too have some federal courts. *Clajon Production Corp. v. Petera,* 70 F.3d 1566 (10th Cir. 1995); *Commercial Builders v. City of Sacramento,* 941 F.2d 872 (9th Cir. 1991).

Finally, a number of states merely express confusion over the issue. *Garneau v. City of Seattle*, 147 F.3d 802, 811 (9th Cir. 1998) (there is "considerable doubt" about the applicability of the *Dolan* rough proportionality test to "legislative, as opposed to administrative exactions."); *Home Builders Association of Central Arizona v. City of Scottsdale,* 930 P.2d 993, 1000 (Ariz. 1997) (the question "has not been settled"); *Rogers Machinery, Inc. v. Washington County*, 45 P.3d 966, 976 (Or. Ct. App. 2002), *cert. denied*, 538 U.S. 906 (2003) (A "split of authority exists in lower courts as to whether *Dolan* is limited to development conditions imposed through adjudicatory decisions or whether it extends to those imposed as a result of generally applicable legislation").

2. State And Federal Courts Are Split As To Whether *Dolan* Applies To Legislative Actions.

A number of state courts have seized on Justice Rehnquist's notation[4] that the exaction in *Dolan* was imposed on a building permit, issued as an "adjudicative" act, to find that heightened scrutiny does not apply to exactions imposed pursuant to legislatively-adopted ordinances of general application. *See San Remo Hotel L.P. v. City of San Francisco*, 41 P.3d 87, 105-06 (Cal. 2002) (Court refusing to apply *Nollan/Dolan*'s standards to legislative impact fee); *e.g., Homebuilders Association v. City of Scottsdale,* 930 P.2d 993, 1000 (Ariz. 1997) (*Dolan's* rough proportionality test does not apply to water service fee enacted by ordinance and uniformly applied to all properties); *Ehrlich v. City of Culver City*, 911 P.2d 429, 444 (Cal. 1996), *cert. denied*, 519 U.S. 929 (1996) (*Dolan*

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[4] *Dolan, supra*, 114 S. Ct. at 2316, n.8.

inapplicable to fees imposed legislatively); *Krupp v. Breckenridge Sanitation District*, 19 P.3d 687 (Colo. 2001) (*Dolan* inapplicable to sanitation district fee imposed legislatively); *Rogers Machinery*, 45 P.3d at 967, 982 (*Dolan* inapplicable to traffic impact fee assessed by ordinance), *Ehrlich, supra*; *Loyola Marymount Univ. v. Los Angeles Unified School District*, 45 Cal.App.4th 1256 (1996); *Home Builders Association of Central Arizona v. City of Scottsdale*, 902 P.2d 1347 (Ariz. 1995); *Southeast Cass Water Resource District v. Burlington Northern Railroad Co.*, 527 N.W.2d 884 (N.D. 1995); *Waters Landing Limited Partnership v. Montgomery County*, 650 A.2d 712 (Md. 1995); *Parking Association of Georgia v. City of Atlanta*, 450 S.E.2d 200 (Ga. 1994); *Arcadia Development Corp. v. City of Bloomington*, 1996 Minn. App. LEXIS 930 (August 13, 1996). So too has at least one federal court. *Harris v. City of Wichita*, 862 F.Supp. 287 (D. Kan. 1994).

Other state courts have held that legislative exactions are subject to *Dolan*'s heightened scrutiny. *Curtis v. Town of South Thomaston*, 708 A.2d 657, 660 (Me. 1998) (*Dolan* applied to fire protection ordinance requiring developers to construct fire pond); *Manocherian v. Lenox Hill Hospital*, 643 N.E.2d 479 (N.Y. 1994), *cert. denied*, 514 U.S. 1109 (1995) (*Nollan* applied to statute requiring apartment owners to renew certain leases with non-private hospital employees); *Art Piculell Group v. Clackamas County*, 1996 Ore. App. LEXIS 1107 (July 31, 1996); *J.C. Reeves Corp. v. Clackamas County*, 887 P.2d 360 (Or. 1994); *Schultz v. City of Grants Pass*, 884 P.2d 569 (Or. 1994); *Northern Illinois Home Builders Association, Inc. v. County of Du Page*, 649 N.E.2d 384 (Ill. 1995); *Trimen Development Company v. King County*, 877 P.2d 187 (Wash. 1994) (A county ordinance requiring developers seeking to build housing either dedicate land for public parks or pay a fee must meet *Dolan*'s "rough proportionality" test). So too has at least one federal court. *National Association of Home Builders v. Chesterfield County*, 907 F.Supp. 166, 168 (E.D. Va. 1995) ("[I]n order for *any specific exaction implemented under a zoning ordinance* to pass constitutional muster . . . " it must meet *Dolan*'s rough proportionality standard.), *aff'd*,

at 1996 U.S. App. LEXIS 18838 (4th Cir. July 30, 1996). *Manocherian v. Lenox Hill Hospital,* 643 N.E.2d 479, 483 (N.Y. 1994), *cert. denied*, 115 S. Ct. 1961, 1962 (1995).

One existing and one former member of this Court are on record as supporting granting certiorari to address this issue. In dissenting from the denial of a writ of certiorari the Justices stated:

> It is not clear why the existence of a taking should turn on the type of governmental entity responsible for the taking. A city council can take property just as well as a planning commission can. Moreover, the general applicability of the ordinance should not be relevant in a takings analysis.... The distinction between sweeping legislative takings and particularized administrative takings appears to be a distraction without a constitutional difference.

Parking Association of Georgia, Inc. v. City of Atlanta, 115 S. Ct. 2268 (1995) (Thomas, J., and O'Connor, J., dissenting).

B. *DOLAN* APPLIES TO MONETARY EXACTIONS

The Supreme Court's decision in *Dolan* itself strongly suggests that the rough proportionality standard is applicable to monetary exactions. This is because several of the cases relied upon by this Court for the rough proportionality standard in *Dolan* involved takings challenges to fees.[5] *E.g., Jordan v. Village of Menomonee Falls,* 137 N.W.2d 442 (Wis. 1965); *Collis v. Bloomington,* 246 N.W.2d 19 (Minn. 1976); *College Station v. Turtle Rock,* 680 S.W.2d

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[5] Justice Stevens recognized this point in his dissent, noting that the cases cited by the majority "involve challenges to provisions ... requiring developers to dedicate either a percentage of the entire parcel ... or an equivalent value in cash ... to help finance the construction of roads, utilities, schools, parks, and playgrounds." *Dolan* at 129 L.Ed.2d 326 (Stevens, J., dissenting).

802 (1984); *Jenad, Inc. v. Scarsdale,* 218 N.E.2d 673 (N.Y. 1966).

In addition, this Court's decision to vacate and remand the Court of Appeal's original decision in *Ehrlich v. City of Culver City,* 512 U.S. 1231, 114 S. Ct. 2731 (1994) was a clear signal that the principles set forth in *Nollan v. California Coastal Comm'n,* 483 U.S. 825 (1987), and *Dolan* apply to monetary exactions.[6] The Arizona Court of Appeals took note of this significant action in *Home Builders Association of Central Arizona v. City of Scottsdale,* 902 P.2d 1347, 1352 (1995), "we agree that the *Ehrlich* remand implies that a monetary fee is subject both to a takings analysis, and . . . to a *Dolan* analysis."

The Constitution supports this position. The Takings Clause of the Fifth Amendment of the United States Constitution, made applicable to the States through the Fourteenth Amendment, *Chicago, B. & Q.R. Co. v. Chicago*, 166 U.S. 226, 236 (1897), provides: "[N]or shall private property be taken for public use, without just compensation." U.S. Const. amend. V. The principal purpose of the Takings Clause is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

There is scant justification for subjecting impact fees to a lesser degree of scrutiny than dedication requirements. Monetary exactions are the functional equivalent of dedications. Treating fees and dedications differently creates a giant loophole in the *Nollan/Dolan* doctrine.

Allowing fees to be reviewed under a lesser degree of scrutiny provides government the incentive and ability to demand mitigation through fees exclusively. Nothing prevents government from exacting a fee, exercising its

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[6] "Whenever this Court grants certiorari and vacates a court of appeals judgment in order to allow that court to reconsider its decision in the light of an intervening decision of this Court, the Court is acting on the merits." *Board Of Trustees Of Keene State College et al. v. Sweeney,* 439 U.S. 24, 25-26 (1978).

power of eminent domain, and using the fee revenue to pay for the acquisition or improvement. From the property owner's perspective, the owner is no less diminished by a monetary fee, than by a dedication requirement.

Post-*Dolan* cases recognize this proposition and are in accord with it. In *City of Portsmouth v. Schlesinger,* 57 F.3d 12 (1st Cir. 1995), the U.S. Court of Appeals for the First Circuit suggested that *Dolan*'s rough proportionality standard applies to impact fees that were imposed on a development project by the City of Portsmouth, New Hampshire.

In *Trimen Development Company v. King County,* 877 P.2d 187, 192 (1994), the Washington Supreme Court applied *Dolan*'s heightened scrutiny to a park impact fee, holding that to be valid, an impact fee must be "required to mitigate the direct impact of the development." And in *Northern Illinois Home Builders Association, Inc. v. County of Du Page,* 649 N.E.2d 384 (Ill. 1995), the Illinois Supreme Court subjected a transportation impact fee to *Dolan*'s heightened scrutiny.

Of interest, a very recent Post-*Dolan* Washington Supreme Court case held that dedications and fees should be evaluated similarly. In *James v. County of Kitsap*, 152 Wash.2d 574, 115 P.3d 286 (2005), the Washington Supreme Court relied on *Isla Verde,* 146 Wash.2d at 761, 49 P.3d 867[7], to hold that development conditions must be tied to a specific, identified impact of a development on a community, **whether the condition is an open space set aside or an impact fee.** However, neither *Isla Verde*

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[7] "For instance, in *Isla Verde Int'l Holdings, Inc. v. City of Camas,* 146 Wash.2d 740, 49 P.3d 867 (2002), we reviewed an action brought by a developer under LUPA, challenging a permit condition as invalid because it was a tax, fee, or charge prohibited by RCW 82.02.020. Although *Isla Verde* did not involve impact fees, but a permit condition requiring a 30 percent open space set aside, we concluded this condition was a "tax, fee, or charge" under RCW 82.02.020 and was invalid because it did not fall within an exception to that provision."

or *James* relies on *Dolan*; instead these cases were decided on statutory grounds. *Id.*

C. *DOLAN* APPLIES TO LEGISLATIVE ACTIONS

1. The Limitations Of The Fifth Amendment Apply To Fees Adopted By A Legislative Action As Well As An Adjudicative Action.

The conditions in *Dolan,* like the City's transportation impact fee here, were imposed under the authority of an ordinance of general application. The City of Tigard's Comprehensive Development Code required all property owners in the Central Business District to comply with certain dedication requirements for pedestrian/bicycle pathways and greenway/drainage space. *Dolan, supra,* 129 L. Ed. 2d at 311-313. As Justice Souter recognized:

> The majority characterizes this case as involving an 'adjudicative decision' to impose permit conditions . . . , but the permit conditions were imposed pursuant to Tigard's Community Development Plan.

Dolan, *supra,* 129 L. Ed. 2d at 334 (Souter, J., dissenting).

Thus, the nature of the exaction involved in *Dolan* and in this case are identical on this point: each was imposed on a specific project pursuant to an essentially legislative determination applicable to all development projects.

Indeed, *Nollan v. California Coastal Commission,* 483 U.S. 825 (1987) makes clear that the exaction imposed was made pursuant to a legislative act, the California Coastal Act of 1976: The Superior Court . . . finding, in part to avoid issues of constitutionality, "that the California Coastal Act of 1976, Cal. Pub. Res. Code Ann. at 30000 et seq. (West 1986), authorized the Commission to impose public access conditions on coastal development permits for the replacement of an existing single-family home with

a new one only where the proposed development would have an adverse impact on public access to the sea.

Unfortunately, lower courts and public agencies have misread the *Dolan* and the *Nollan* decision by seizing upon the "adjudicative decision" language used by the majority in *Dolan, supra,* 114 S. Ct. at 2316, n.8, as limiting the application of *Dolan* and *Nollan.*

Subsequent to its decision in *Dolan*, the Supreme Court has confirmed that *Dolan* applies to legislative acts. In *Altimus v. Oregon,* 115 S. Ct. 44 (1994), this Court vacated and remanded the case to the Court of Appeals of Oregon "for further consideration in light of *Dolan v. City of Tigard.*" *Altimus* involved a takings challenge to an exaction imposed as a condition to a project requesting a zoning change – a legislative act. (See footnote 5, *supra.*)

Post-*Dolan* cases have recognized that heightened scrutiny is appropriate where an exaction is being applied to a particular project, notwithstanding whether the government approval being sought is nominally "legislative" or "adjudicative." In *J.C. Reeves Corp. v. Clackamas County,* 887 P.2d 360 (Or. 1994), the Court applied Dolan's rough proportionality standard to exactions imposed pursuant to a county-wide zoning ordinance:

> [T]he county relies on the fact that some of the improvements are required by its zoning ordinance. As we said in *Schultz v. Grants Pass* . . . however, "the character of the [condition] remains the type that is subject to the analysis in *Dolan*" . . . , whether it is legislatively required or a case-specific formulation. The nature, not the source, of the imposition is what matters. Our conclusion is not at odds with the Supreme Court's differentiation between adjudicative conditions and particular properties and generally-applicable legislative regulations. . . . A condition on the development of particular property is not converted into something other than that by reason of legislation that requires it to be imposed.

Id. at 365, n.1 (citation omitted). *See also, Schultz v. City of Grants Pass,* 884 P.2d 569 (Or. 1994) (*Dolan*'s

heightened scrutiny standard applicable to city's exaction, notwithstanding the fact that the exaction was imposed pursuant to city-wide ordinance of general application).

At least two post-*Dolan* Washington decisions are in accord, although neither are decided on constitutional basis. In July, 2002, the Washington Supreme Court decided two pivotal cases that refine the authority of municipalities to impose conditions requiring set-asides and impact fees. These cases mandate that any dedication or fee must be roughly proportional to the actual impacts of the proposed project, and place the burden of demonstrating proportionality on the local jurisdiction. *See Benchmark Land Co. v. City of Battle Ground*, 146 Wn.2d 685 (2002); *Isla Verde Int'l Holdings v. City of Camas*, 146 Wn.2d 740 (2002).

The Washington Supreme Court case of *Benchmark* emphasizes the long standing requirement that an essential nexus between the actual impacts caused by the proposed development and conditions imposed on the development. The related case of *Isla Verde* held that dedication or payment of impact fees that are not reasonably necessary as a direct result of the proposed development violate RCW 82.02.020.

The Court mandates that any fees or dedications must be attributable to specific impacts from the proposed development. Plat conditions or other development extractions which are not factually supported as required in these recent holdings, are incorrect as a matter of law.

In *Benchmark*, the City of Battle Ground conditioned approval of a development permit, requiring the developer to make improvements to a street adjoining the development. The city's required improvements were frontage based on the city code standards, but were not tied to the specific impacts of the project. The Court found that the requirements were intended to remedy an existing deficiency, and bore little relation to the proposed project. The Court held that the conditions were not supported by substantial evidence; because there was no showing that "the required expenditure for street improvements was not

directly related to traffic generated by the development." *Benchmark*, 146 Wn.2d at 695. The holding clearly specifies that any fees or dedications must be attributable to specific impacts from the proposed development.

In *Isla Verde*, the Court also applied the proportionality requirement to the specific statutory framework set forth in RCW 82.02.020, to invalidate a 30 percent open space set-aside condition required by the City of Camas. *Isla Verde*, 146 Wn.2d at 752. The Court recognized that RCW 82.02.020 does not only prohibit City-imposed taxes on the development of real property, but also fees and charges, including dedications as well. *Id.* at 753, n.8. The only exception is where the city is able to demonstrate that the condition imposed is needed as direct result of the project's impact. *Id.* at 759. The Court also stated that the burden of proving the required relationship between the condition and the impact of the development rested on the city. *Id.* at 756.

Because the Court recognized that RCW 82.02.020 applies not only to taxes and fees, but also to requirements and conditions such as open space set-asides, (*Id.* at 757), the Court invalidated the City's open space requirement, holding that Camas failed to produce sufficient evidence that "the 30 percent open space set aside is ***reasonably necessary*** as a ***direct result*** of the proposed subdivision or reasonably necessary to mitigate a direct impact that is a consequence of the proposed subdivision." *Id.* at 759. Finally, the Court emphasized that, not only must the requirement be "reasonably necessary," but that "development conditions must be tied to a ***specific, identified*** impact of a development ... as a direct result of the proposed development or plat," *Id.* at 761.

The Court stressed that RCW 82.02.020 does not permit conditions that satisfy a "reasonably necessary" standard for all new development ***collectively***; it specifically requires that a condition be "reasonably necessary as a direct result of the proposed development or plat." *Isla Verde* at 879. Emphasis added.

Thus in these post *Dolan*, pre-*Drebick* cases, the Washington Supreme Court made it clear that cities and counties cannot simply point to an adopted code provision as authority to impose development extractions (in this case, frontage improvements). Instead, the Supreme Court held that the jurisdiction is required to undergo an individualized analysis for each project, and can only impose a condition on development if it is shown that the condition is needed to mitigate an impact ***actually caused*** by the proposed project.

The Court of Appeals' decision in the present case followed this clear line of reasoning consistent with *Nollan/ Dolan*. *City of Olympia v. Drebick*, No. 29018-9-II, 2004 WL 102850 (Wash.App. Div. 2 Jan. 22, 2004), when it invalidated the City of Olympia's traffic impact fee. The Court found that an impact fee formula which was based on an averaging of traffic volumes did not relate to the actual impacts of a proposed project. The Court of Appeals correctly invalidated the City's assessment, and found that impact fees must relate to the actual impacts of the development.

In invalidating Olympia's development condition, the Court clearly stated that (1) the government must identify a "public" impact as opposed to a private one, (2) the government must show that the *proposed project* will create or exacerbate the impact, (3) the government must show that the fee or exaction "tends to solve" or alleviate the impact, and (4) that the proposed solution is "roughly proportional" to the impact of the proposed project, i.e. that it will alleviate the impacts caused by the project itself.

Unfortunately, the Washington Supreme Court reversed.

This Court should accept review to correct this change of course, and provide clarity on a nation-wide basis.

2. Concern For A Heightened Risk Of Extortion Requires Dolan's Application to Legislatively Adopted Fees.

The Washington Supreme Court sidestepped the *Nollan/Dolan* test by its limited decision to an interpretation of the requirements of the local impact fee statutes (App. at A-8-A-11; App. at G and H), and on its refusal to apply the *Nollan* and *Dolan* standards to the exactions at issue (App. A-11-A-12).

However, despite ducking the critical constitutional issues, the Court's scathing comments directed to dissent sow the seeds for a significant withering of future application of *Nollan/Dolan* in Washington state: "The dissent does not explain that neither *Nollan* nor *Dolan* concerned the imposition of impact fees but addressed instead the authority of a local government to condition development approved on a property owner's dedication of a portion of land for public use." App. at A-11-A-12. The majority cites *Ehrlich v. City of Culver City*, 911 P.2d 429, 444 (Cal.), *cert. denied*, 519 U.S. 929 (1996), for the proposition that *Nollan* and *Dolan* do not apply to legislatively prescribed development fees. *Id.* at A-12-A-13.

This Court should reinforce application of the constitutional analysis of *Nollan/Dolan* by upholding the constitutional construction of the local impact fee statutes, as urged by the dissent. App. at A-33-A-37. Citing the Court of Appeals decision, the dissent noted that "the most important conclusion to be drawn from the legislative history is the legislature's deliberate use of the *identical* terms the United States Supreme Court used to describe the 'nexus' requirement of the Fifth Amendment: 'reasonably related to.'" App. at A-33. The majority, "defeats the *Nollan* and the Washington State Legislature's definition [of 'reasonably related']." App. at A-36.

The Washington Court's rationale in part was based on deference owed to legislatively adopted fees, as opposed to administrative conditions. However, preservation of this Court's constitutional protections against extortion-like

fees requires that legislative actions **not** be treated differently from exaction imposed administratively. The heightened risk of extortion exists ***no less*** for legislatively adopted fees, and arguably presents a ***greater*** risk.

Current residents, looking out for their own interests, generally believe that it is better to shift facility costs to their ***future*** and yet unknown neighbors, rather than pay for such facilities themselves. The existing residents have no quarrel with legislators who pass along a disproportionate share of facility costs to the upcoming but not yet present community members.

In contrast, the new home buyer has the least political clout to remedy extortionate fees because he or she is an empty chair at that political table, unaware, uninterested or residing outside of the public agency's jurisdiction at the time of the fee's adoption.

In addition, there is no requirement that a new or future home buyer be given notice of a legislatively adopted fee and therefore this class of affected parties is the least able to become involved in the "political process."[8]

Elected officials and current residents, aware of these facts, often argue in favor of the adoption of fees which pay for public facilities not entirely, or not in the least, caused by new development. Elected officials realize that since the ultimate fee payor is not currently a constituent, has no notice, and may not yet be interested in the issue until

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[8] Where a rule of conduct applies to more than a few people it is impracticable that every one should have a direct voice in its adoption. The Constitution does not require all public acts to be done in town meeting or an assembly of the whole. General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. *Bi-Metallic Co. v. Colorado*, 239 U.S. 441, 445 (1915).

"[O]nly those governmental decisions which are adjudicative in nature are subject to procedural due process principles. Legislative action is not burdened by such requirements." *Horn v. County of Ventura*, 596 P.2d 1134, 1137 (1979); *see also, Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 313 (1950).

the new home threshold is crossed, he or she is unlikely to express his or her displeasure with the fee by voting the decision maker out of office.[9] As a result, the risk of extortion by legislation for it is just as high, if not higher than it is for those which are individually imposed.

Further, a legislatively adopted fee may be adopted years prior to its actual imposition and on an entire city or county. Fees imposed on adjudicatory land use approvals occur closer in time to the purchase of a new home and on a geographically specific project and are therefore more likely to provide notice to the new home buyer.

Impact fees are fees tacked onto the cost of a newly constructed house to pay for the occupants' supposed impact on the area's roads, parks and schools. Depending on the jurisdiction, impact fees can range from a few thousand dollars to over $20,000. Not coincidentally, jurisdictions charging impact fees typically boast the least affordable housing markets.

> . . . because impact fees are charged only on new homes, not on existing homes, they don't ensure those who have a new impact on a community actually pay to mitigate that impact. Here's an example: A family with six school age children could move into Olympia from elsewhere, purchase an existing "family" home and pay no impact fee, even though they will be impacting the city's

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[9] *See, e.g., California Building Industry Association v. Governing Board of Newhall School District*, 206 Cal.App.3d 212, 218 (1988) (" . . . the exactions were imposed not on an electorate which, unsurprisingly, voted overwhelmingly to approve them, but rather solely on the developers of new residential projects."); *Stubblefield Construction Co. v. City of San Bernardino*, 32 Cal.App.4th 687, 711 (1995), *cert. denied*, 116 S. Ct. 300 ("It is not uncommon or unusual for a legislator to oppose a project and to use all means within his or her power to defeat it. After all, a legislator is supposed to respond to the concerns of his or her *constituents* . . . Whether their concerns were proper or justified is not the issue here. The point is that their elected representative decided to oppose the project, and did so vigorously." Emphasis added.).

> schools, roads, parks, etc. Meanwhile, an "empty-nester" couple that sells that "family home" in Olympia and purchases a newly constructed "move-down home" up the street, will pay exorbitant impact fees, even though they are having no new impact (in fact – they've already paid for it!). Hardly a fair and efficient way to pay for growth.

"*Governor Holds The Key To Affordable Housing*," President's Letter, BIAW's *Building Insight* Publication, August 2006.

Legislatively adopted fees, no less than excessive regulations and onerous procedures, limit the number of homes that can be built, increase the cost of those that are built, and reduce the affordability of all homes. The result, sometimes intended, is to restrict those who can live in some areas to only the wealthiest. The greatest impact falls on those with limited incomes, such as young families, first time home buyers, minorities, and others with limited incomes. These classes of persons in Washington State deserve the constitutional protections that *Nollan/Dolan* affords.

3. Deference To Legislative Acts Does Not Require Ignoring The Takings Clause.

The separation of powers doctrine supports that greater deference be paid to a public agency's legislative, as opposed to adjudicative, actions. Yet, nowhere does this policy of greater deference require a reviewing Court to ignore Constitutional protections.

In *U.S. v. Winstar Corp.*, 1996 U.S. LEXIS 4266 (July 1, 1996) (hereinafter "*Winstar*"), this Court stated that complete deference to a legislative assessment is not appropriate when the state's self-interest is at stake. *Id.* at 100, n.41. The Court further noted that a stricter level of scrutiny applies in such cases. *Id.* The Court characterized self-interest as an:

> [I]nstance in which the government seeks to shift the costs of meeting its legitimate public responsibilities to private parties. [Citation omitted.] The government may not 'force some people alone to bear public burdens which . . . should be borne by the public as a whole.'[10] *Id.*

The Court's clarification was in response to the government's claim that the Sovereign Acts Doctrine applied and therefore absolute deference must be accorded to the Legislature's public and generally applicable act.[11]

Although *Winstar* applied the prohibitions of a different provision of the U.S. Constitution, i.e., the Contract Clause, this Court found that the deference generally granted to legislative determinations is not applicable where the interpretation or application of a Constitutional provision is at issue. As this Court has stated, "whether the action of [either the Legislative or Executive Branch] exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution." *Nixon v. United States,* 506 U.S. 224, 238 (1993).

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[10] The Court also cited *Dolan* for this proposition noting that all regulations have their costs. *Winstar, supra,* at 76-77. As this Court noted, *supra,* the exactions in *Dolan* were based on legislative enactments.

[11] The government in *Winstar* argued that a standard almost identical to the *Agins v. Tiburon*, 447 U.S. 255 (1980) test should be applied to the public and general act of the legislature, i.e., whether the act "advance[s] the general welfare." *Winstar Corp., supra,* at 93-94. The *Ehrlich* Court suggested that the test for legislative actions should be whether they substantially advance a legitimate governmental purpose. As this Court rejected the test proffered by the government in *Winstar,* so should it reverse the California Court's deferential standard applied to legislatively enacted, generally applicable fees.

IV. CONCLUSION

Therefore, for the reasons stated above and in the Brief for Petitioners, the MBA Amicus pray that this Court grant certiorari and reverse the Washington Supreme Court's opinion by applying *Dolan* to monetary exactions and by applying *Dolan* to legislative actions.

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or pay money to public agencies as a condition to granting land use, subdivision, and even non-discretionary construction approvals. In this case, a city required a developer – in fact requires all developers within its jurisdiction – to pay a fee that was based not on the specific impact of a particular development, but on the average impact of all anticipated development in the city. This case thus presents two issues of great importance to NAHB and its members.

First, do the requirements of *Nollan* and *Dolan* apply to impact fees that are imposed on property owners as a condition of permit approval, where those fees have the same economic impact on property owners as dedications of land? This Court's previous pronouncements place impact fees with such effects squarely within the category of "exactions," a form of taking that constitutionally requires just compensation. NAHB members need this Court's protection when impact fees threaten to become "not a valid regulation of land use but 'an out-and-out plan of extortion'" (*Nollan*, 483 U.S. at 837), just as much as they do when the government requires a dedication of land.

Second, may a local government avoid *Dolan*'s requirement of "rough proportionality," and its attendant burden on the local government of making an individualized determination, by passing a legislative exaction on an area-wide basis? NAHB members need this Court to rule that government may not use its permitting power to force *all* new developments to pay more than their fair share, any more than government may require *one* development to pay more than its fair share.

The protection from over-reaching and excessive governmental exactions embodied in *Dolan* is particularly important in the context of affordable housing. By shifting disproportionate costs of public services on to new housing,

exactions that do not comport with *Dolan* erect more imposing barriers to affordability. These barriers compound what is already a significant and serious social problem plaguing this country.

The lower courts have reached inconsistent and conflicting results when faced with these issues. Absent a clear ruling from this Court, NAHB members in different jurisdictions face inconsistent treatment under what is supposed to be a uniform national Takings Clause. The Takings Clause is intended to prevent what occurred in this case and what home builders endure time and again: a local government forcing one landowner to bear the entire economic cost of providing a public good, when "in all fairness and justice," that cost "should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

SUMMARY OF ARGUMENT

Exactions are a type of taking that can trigger the payment of just compensation under the Fifth Amendment. Impact fees are one category of exaction. In the exaction context, the requirements of the Takings Clause assure property owners that the government must make an individualized determination of whether an impact fee is "roughly proportional" to the impact of a proposed development; and further guarantee that, when it is not, the government will be required to pay back the excess.

Exactions have the same economic impact on property owners whether they are imposed by legislation or adjudication, and *Dolan*'s requirements of individualized determination and "rough proportionality" should apply regardless of how the exaction is imposed.

By imposing excessive costs on development when impact fees or other exactions are levied without meeting the requirements of *Dolan*, local governments discourage the construction of affordable housing.

ARGUMENT

I. THE FIFTH AMENDMENT APPLIES EQUALLY TO EXACTIONS THAT ARE IMPACT FEES AND EXACTIONS THAT REQUIRE DEDICATIONS OF LAND.

As explained in the petition for *certiorari*, some of the courts that have refused to apply the *Nollan-Dolan* requirements to impact fees have viewed such fees as somehow categorically different from mandatory dedications of land. However, no abstract conceptualization or "critical leap" is necessary to equate these economic burdens. *Cf., McCarthy v. City of Leawood*, 894 P.2d 836, 845 (Kan. 1995). Practically speaking, impact fees are simply one variety of exaction. In the land use context they must meet the constitutional requirements set forth in *Nollan* and *Dolan* to make sure that land use regulations do not over-reach by requiring the property owners who need a permit to bear economic costs that should be borne by the public as a whole.

Lingle v. Chevron U.S.A., Inc., 544 U.S. 528 (2005) summarized the kinds of takings that trigger the payment of just compensation. First, the "paradigmatic taking . . . is a direct government appropriation or physical invasion of private property." *Id.* at 537. Second, "government regulation of private property may, in some instances, be so onerous that its effect is tantamount to a direct appropriation or ouster." *Id.* *Lingle* further clarified the "theories" available for "a plaintiff seeking to challenge a government regulation as an uncompensated taking" (*Id.* at

548) as encompassing regulations which: force a physical occupation, *e.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); deprive a property owner of all economically viable use of the property, *e.g., Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); or "go too far" so as to become the functional equivalent of a traditional taking, *e.g., Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978).

The final category of regulatory taking is "a land-use exaction violating the standards set forth in *Nollan* and *Dolan*." *Lingle*, 544 U.S. at 548. Exactions are a special application of the doctrine of "unconstitutional conditions," which provides that the government may not require a person to give up a constitutional right – such as the right to receive just compensation when property is taken for a public use – in exchange for a discretionary benefit conferred by the government where the benefit has little or no relationship to the property. *Dolan*, 512 U.S. at 385.

The lower courts have developed a detailed understanding of exactions. They come in four recognizable categories: "(1) mandatory dedications of land for roads, schools or parks, as a condition to plat approval, (2) fees-in-lieu of mandatory dedication, (3) water or sewage connection fees, and (4) impact fees." *B.A.M. Development, L.L.C. v. Salt Lake County*, 128 P.3d 1161, 1169 (Utah 2006).

The key to *Dolan*'s application of the Takings Clause to exactions in the land use context is that, in substance, it prevents governments from over-charging new development for the external, public costs it creates. Under *Dolan*, the exaction must be roughly proportional to the impact of the new development, as measured in an individualized determination made by the permitting body. If not proven to be roughly proportional, the Fifth

Amendment requires that compensation be paid for the excess. In this regard, disproportionate impact fees clearly fall within *Dolan*'s ambit just like other forms of exactions.[2]

Under the proper application of *Nollan* and *Dolan*, the "taking" only occurs where, and to the extent that, the monetary exaction exceeds what may be charged to the particular development under the rough proportionality test. Where a monetary exaction goes beyond the impact of the development, the local government is requiring the new development to shoulder a burden that should be borne by the public as a whole, and thus effects a taking. The constitutionally-required just compensation is then a return of that portion of the monetary fee constituting overpayment. In this regard, takings analysis is more finely tuned than substantive due process analysis when applied to impact fees. The former requires that an excess be paid back to the developer but allows the government to keep the justifiable portion of the fee. The latter simply invalidates the entire fee.

Even though this Court has made it clear that takings claims involving land use exactions in the form of physical dedications of property are evaluated under the *Dolan* "rough proportionality" test, the lower courts appear to

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[2] Some argue that five justices in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998) agreed that the Takings Clause did not apply to the mere payment of money, thus resolving the applicability of *Dolan* to impact fees. However, one of the five was Justice Kennedy, who confined his objection to a monetary obligation that was not imposed with respect to or on a particular property. 524 U.S. at 540. Impact fees are, of course, imposed with respect to development that occurs on a particular property, and so Justice Kennedy's opinion in *Eastern Enterprises* did not resolve the issue.

believe that applying *Dolan* to impact fees and monetary exactions "is a complex question and is not completely resolved." *Dudek v. Umatilla County*, 69 P.3d 751, 757 (Ore Ct. App. 2003). *Compare Ehrlich v. City of Culver City*, 12 Cal.4th 854, 911 P.2d 429 (1996), *cert. denied*, 519 U.S. 929 (1996) (at least those monetary land use exactions that are imposed "on an individual and discretionary basis" are subject to *Dolan* scrutiny) *with Town of Flower Mound v. Stafford Estates Limited Partnership*, 135 S.W.3d 620 (Tex. 2004) (all monetary land use exactions are subject to *Dolan*, whether imposed on an individual, discretionary basis or area-wide) *and Twin Lakes Dev. Corp. v. Town of Monroe*, 1 N.Y.3d 98, 105, 801 N.E.2d 821, 825 (2003), *cert. denied*, 541 U.S. 974 (2004); *Smith v. Town of Mendon*, 4 N.Y.3d 1, 12, 822 N.E.2d 1214, 1219 (2004) (*Dolan* scrutiny applies to dedications of land and to fees-in-lieu of land dedications).

This Court should clear the air. From a land owner's perspective, there is no practical distinction between exactions requiring land dedications and exactions requiring the payment of money. Each has an identifiable economic impact on the builder or property owner. Each is susceptible of the same kind of abuse by government. Each can be easily remedied by application of the just compensation requirement. (In fact, it may be easier to require just compensation for monetary exactions than for exactions of real estate. When the latter cannot meet the rough proportionality standard, a court must determine the value of the excess land that was taken by the permitting authority. This step is unnecessary when the taking is accomplished by an excessive fee – all the court need do is order a payment back of the over-charge.)

In the end, "[f]rom the property owner's point of view, it may matter little whether his land" is taken through

conditions that demand disproportionate land dedication or excessive payment of impact fees. See *San Diego Gas & Elec. Co. v. City of San Diego,* 450 U.S. 621, 652 (Brennan, J., plurality dissent), adopted in *First English Evangelical Lutheran Church of Glendale v. Los Angeles County,* 482 U.S. 304 (1987). "[T]he Constitution measures a takings of property not by what a State says, or by what it intends, but by what it *does*." *Hughes v. Washington*, 389 U.S. 290, 298 (1967) (Stewart, J., concurring). This Court should hold that all land use exactions, whether of land or of money, are subject to *Dolan.*

II. THIS COURT NEEDS TO CONFIRM AGAIN THAT THE "ROUGH PROPORTIONALITY" AND INDIVIDUALIZED DETERMINATION REQUIREMENTS OF *DOLAN* APPLY EQUALLY TO LEGISLATIVE EXACTIONS AND TO ADMINISTRATIVE OR QUASI-JUDICIAL EXACTIONS.

This Court should grant *certiorari* in this case and reverse the Washington Supreme Court because that court incorrectly focused on a false distinction between legislative and adjudicative exactions. This Court has not made such a distinction, but instead has previously applied the Takings Clause to legislative actions, both in general and in *Dolan* itself. Nevertheless, the lower courts are confused, and this Court needs to set the record straight.

A. This Court Has Long Recognized the General Principle that Legislation Can Effect a Taking.

This Court has frequently – and recently – held that a legislative enactment can result in an unconstitutional taking. For example, in *Babbitt v. Youpee*, 519 U.S. 234, 243 (1997) and *Hodel v. Irving*, 481 U.S. 704, 716-18 (1987), this Court twice held the escheat provision of the

Indian Land Consolidation Act (25 U.S.C. § 2206) unconstitutional. And, in *Eastern Enterprises v. Apfel*, 524 U.S. 498, 529-37 (1998), the plurality opinion held the application of the Coal Industry Retiree Health Benefit Act of 1922 (2 U.S.C. § 9701-9722) unconstitutional for requiring millions of dollars in health care contributions based on a predecessor company's activities decades earlier. Thus, the notion that government exactions are somehow immune from takings analysis if they are imposed by legislation has no basis as a general principle.

Most of this Court's previous holdings in this regard, however, did not involve exactions in the land use context. Given a plethora of lower court decisions seeking to avoid the mandate of *Dolan*, this Court should now make it clear that exactions that are not roughly proportional to the impact of a proposed development require just compensation, regardless of how the exactions are imposed.

This simple conclusion makes sense. As stated before by Justice Thomas, "It is not clear why the existence of a taking should turn on the type of governmental entity responsible for the taking. A city council can take property just as well as a planning commission can. . . . The distinction between sweeping legislative takings and particularized administrative takings appears to be a distinction without a constitutional difference." *Parking Ass'n of Georgia, Inc.*, 515 U.S. 1116, 1118 (1995) (Thomas, J., dissenting).

B. *Dolan* Itself Involved an Exaction Imposed by Legislation.

The Takings Clause requirement that exactions be roughly proportional was decreed in a case that was itself instigated by a legislative requirement instead of an *ad hoc* administrative determination. At issue in *Dolan* were

dedications required pursuant to the Tigard, Oregon Community Development Code ("CDC"). As this Court explained in *Dolan*:

> The CDC requires property owners in the area zoned Central Business District to comply with a 15% open space and landscaping requirement, . . . The CDC requires that new development facilitate [a plan for a pedestrian/bicycle pathway] by dedicating land for pedestrian pathways where provided for in the pedestrian/bicycle pathway plan."

512 U.S. at 377-78.[3] Thus, the predicate for the numerous decisions which turn on whether the exaction is imposed by legislative or administrative means is not justified by reference to this Court's original decision.

There is, of course, language in *Dolan* that may suggest a distinction between legislative and administrative actions. But it is a false distinction. The language appears in a discussion of cases involving general land use restrictions:

> First, [those cases] involved essentially legislative determinations classifying entire areas of the city, whereas here the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel.

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[3] Some analyses point to footnote 8 in *Dolan*, which states, "Here, by contrast, the City made an *adjudicative decision* to condition petitioner's application for a building permit on an individual parcel." 512 U.S. at 391 (emphasis added). However, Justice Souter, in his dissent, clarified the situation by pointing out that footnote 8 misstated the genesis of the condition: "The majority characterizes this case as involving an 'adjudicative decision' to impose permit conditions [citations omitted], but the permit conditions were imposed pursuant to Tigard's Community Development Code." 512 U.S. at 413, n.*.

512 U.S. at 385. Those seeking to avoid the rough proportionality requirement seize on the above term "legislative determination." But the contrast emphasized by the Court was between *classifications*, on the one hand, and *conditions*, on the other. While the requirement of rough proportionality does not apply to the first (*City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 703 (1999)), it does apply to the second, regardless of whether the condition applies to all properties in an area by legislative decree, or just one property by administrative determination.

C. There is Great Confusion in the Lower Courts.

"The lower courts are in conflict over whether *Dolan*'s test for property regulation should be applied in cases where the alleged taking occurs through an Act of the legislature." *Parking Ass'n of Georgia, Inc.*, 515 U.S. 1116, 1117 (1995) (Thomas, J., dissenting).

The problem is widespread and the consequent results inconsistent. In addition to the cases cited by petitioners, the Illinois Appellate Court held in *Amoco Oil Co. v. Village of Schaumburg*, 277 Ill. App. 3d 926, 941-43, 661 N.E.2d 380, 390-91 (1st Dist. 1995), *leave to appeal denied*, 667 N.E.2d 1055 (Ill. 1996), *cert. denied*, 519 U.S. 976 (1996), that there is no reason to differentiate between exactions imposed legislatively or by adjudication.

On the other hand, cases holding that exactions imposed by legislation need not meet *Dolan*'s rough proportionality test include *Wisconsin Builders Ass'n v. Wisconsin Dep't of Transportation*, 285 Wis.2d 473, 504, 702 N.W.2d 433, 448 (2005); *Wonders v. Pima County*, 89 P.3d 810, 816 (Ariz. Ct. App. 2004); *Homebuilders Ass'n v. Tualatin Hills Park & Recreation Dist.*, 62 P.3d 404, 409 (Ore. Ct. App. 2003); *Home Builders Ass'n v. City of Napa*, 108 Cal.

Rptr.2d 60, 65 (2001), *cert. denied*, 535 U.S. 954 (2002); *Arcadia Dev. Corp. v. City of Bloomington*, 552 N.W.2d 281, 286 (Minn. Ct. App. 1996); and *Harris v. Wichita*, 862 F. Supp. 287, 294 (D. Kan. 1994).

The Supreme Court of Utah called it an "unruly judicial chorus on this issue," but that court found it unnecessary to add its voice because the Utah legislature had stepped in to resolve the issue. *B.A.M. Development, L.L.C. v. Salt Lake County*, 128 P.3d 1161, 1171 (Utah 2006). Utah Code Ann. § 17-27a-507 applies *Dolan*'s rough proportionality test to all exactions, whether imposed legislatively or administratively.[4]

A pending bill in Congress would resolve the issue by applying the constitutional test equally to both legislative and adjudicative exactions, as well as to required dedications of both land and fees. H.R. 4772, The Private Property Rights Implementation Act of 2006, 109th Cong., 2d Sess. (2006).[5] While it passed the Judiciary Committee by voice vote on July 12, 2006, there has not yet been action on H.R. 4772 by the full House.

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[4] The dissent in the Washington Supreme Court in this case believed that the Washington state legislature had likewise applied the *Dolan* rough proportionality test by statute, but the majority held otherwise. *City of Olympia v. Drebick*, 156 Wash.2d 289, 303-04, 320, 126 P.3d 802, 808-09, 817 (2006).

[5] Section 5 of H.R. 4772 provides: "If the party injured seeks to redress the deprivation of a property right or privilege under this section that is secured by the Constitution by asserting a claim that concerns -- (1) an approval to develop real property that is subject to conditions or exactions, then the person acting under color of State law is liable if any such condition or exaction, whether legislative or adjudicatory in nature, including but not limited to the payment of a monetary fee or a dedication of real property from the injured party, is unconstitutional."

One commentator reviewed 29 cases construing *Dolan* and concluded that the lower courts are simply confused. "The survey of the caselaw reveals that the lower courts' application of the legislative/adjudicative distinction is inconsistent." *Note, The Distinction between Legislative and Adjudicative Decisions in Dolan v. City of Tigard*, 75 N.Y.U. L. Rev. 242, 256 (2000). The conflict in the lower courts makes the grant of *certiorari* all the more compelling in this case. *See Parking Ass'n of Georgia, Inc.*, 515 U.S. 1116, 1118 (1995) (Thomas, J., dissenting).

D. The Legislative/Administrative Distinction is Beset by Practical Difficulties and Gives Rise to Perverse Incentives.

This Court should clear up the post-*Dolan* confusion not only because inconsistent lower courts are misapplying the law but also because the distinction between exactions by legislation and exactions by administrative determination cannot be so easily drawn. It is another false distinction that encourages municipalities to shift public costs away from voters and on to those who have no voice in municipal affairs. "The takings clause . . . protects against this majoritarian tyranny . . . by insisting that the costs imposed by government use or regulation of private property are borne by all to whom the benefits inure." James L. Huffman, Dolan v. Tigard: *Another Step in the Right Direction,* 25 Envtl. L. 143, 152 (1995).

As a practical matter, it is difficult to determine just when a particular action should be characterized as legislative or administrative, especially in the land use context. "[I]n reality, the discretionary powers of municipal authorities exist along a continuum and seldom fall into the neat categories of a fully predetermined legislative exaction or a completely discretionary

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The Texas Supreme Court was correct. Courts struggle with the application of such a distinction, particularly in the land use context. Are special use approvals legislative or quasi-judicial? The law seems to vary. *See, e.g., Klaeren v. Village of Lisle*, 202 Ill.2d 164, 183, 781 N.E.2d 223, 234 (2002) (overruling prior cases and holding that special use approvals are administrative or quasi-judicial). How about variances? The courts differ. *Compare Topanga Ass'n for a Scenic Community v. County of Los Angeles*, 11 Cal.3d 506, 517, 522 P.2d 12, 19 (1974) (grant of a variance is a quasi-judicial, administrative act) *with Hawthorne v. Village of Olympia Fields*, 204 Ill.2d 243, 253, 790 N.E.2d 832, 839 (2004) (action by village board on request for a variance is legislative). The rezoning of a single parcel of land? One line of cases holds it to be legislative (*Arnel Development Co. v. City of Costa Mesa*, 620 P.2d 565, 567 (Cal. 1980)), while another finds it to be quasi-judicial (*see Harris v. County of Riverside*, 904 F.2d 497 (9th Cir. 1990); *Nasierowski Bros. Investment Co. v. City of Sterling Heights*, 949 F.2d 890, 895-897 (6th Cir. 1991); *City of Louisville v. McDonald*, 470 S.W.2d 173, 176-78 (Ky. 1971)).

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exactions but not to those imposed by legislative fiat is in fact fraught with practical difficulties. It is also bad public policy, because the distinction allows municipalities the too-easy opportunity to simply push the costs attendant to development on a small number of individuals. Furthermore, in many cases of residential development the payor is an out-of-town corporation and those residents ultimately bearing the cost of the impact fee (through higher home prices) are the buyers of the homes yet to be built – two groups who lack the right to vote in municipal elections.[6] Thus, the idea that the democratic process could be a sufficient check on extortionate impact fees is not supportable. *See Town of Flower Mound*, 135 S.W.3d at 640-41.

Immunizing legislatively imposed exactions from *Dolan*'s rough proportionality requirement grants the government *carte blanche* to require a developer to pay for problems that the new development did not create. *Certiorari* should be granted to correct any trend in the law that is contrary to *Dolan*.

III. IMPROPER EXACTIONS HURT AFFORDABLE HOUSING.

The confusion in the law is bad enough. Worse is the consequence of continued confusion: more improper exactions on homebuilders, and less affordable housing for the public. This Court should grant *certiorari* now to stop municipalities from continuing to impose what amounts to a silent tax that limits the stock of affordable housing.

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or pay money to public agencies as a condition to granting land use, subdivision, and even non-discretionary construction approvals. In this case, a city required a developer – in fact requires all developers within its jurisdiction – to pay a fee that was based not on the specific impact of a particular development, but on the average impact of all anticipated development in the city. This case thus presents two issues of great importance to NAHB and its members.

First, do the requirements of *Nollan* and *Dolan* apply to impact fees that are imposed on property owners as a condition of permit approval, where those fees have the same economic impact on property owners as dedications of land? This Court's previous pronouncements place impact fees with such effects squarely within the category of "exactions," a form of taking that constitutionally requires just compensation. NAHB members need this Court's protection when impact fees threaten to become "not a valid regulation of land use but 'an out-and-out plan of extortion'" (*Nollan*, 483 U.S. at 837), just as much as they do when the government requires a dedication of land.

Second, may a local government avoid *Dolan*'s requirement of "rough proportionality," and its attendant burden on the local government of making an individualized determination, by passing a legislative exaction on an area-wide basis? NAHB members need this Court to rule that government may not use its permitting power to force *all* new developments to pay more than their fair share, any more than government may require *one* development to pay more than its fair share.

The protection from over-reaching and excessive governmental exactions embodied in *Dolan* is particularly important in the context of affordable housing. By shifting disproportionate costs of public services on to new housing,

exactions that do not comport with *Dolan* erect more imposing barriers to affordability. These barriers compound what is already a significant and serious social problem plaguing this country.

The lower courts have reached inconsistent and conflicting results when faced with these issues. Absent a clear ruling from this Court, NAHB members in different jurisdictions face inconsistent treatment under what is supposed to be a uniform national Takings Clause. The Takings Clause is intended to prevent what occurred in this case and what home builders endure time and again: a local government forcing one landowner to bear the entire economic cost of providing a public good, when "in all fairness and justice," that cost "should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

SUMMARY OF ARGUMENT

Exactions are a type of taking that can trigger the payment of just compensation under the Fifth Amendment. Impact fees are one category of exaction. In the exaction context, the requirements of the Takings Clause assure property owners that the government must make an individualized determination of whether an impact fee is "roughly proportional" to the impact of a proposed development; and further guarantee that, when it is not, the government will be required to pay back the excess.

Exactions have the same economic impact on property owners whether they are imposed by legislation or adjudication, and *Dolan*'s requirements of individualized determination and "rough proportionality" should apply regardless of how the exaction is imposed.

By imposing excessive costs on development when impact fees or other exactions are levied without meeting the requirements of *Dolan*, local governments discourage the construction of affordable housing.

ARGUMENT

I. THE FIFTH AMENDMENT APPLIES EQUALLY TO EXACTIONS THAT ARE IMPACT FEES AND EXACTIONS THAT REQUIRE DEDICATIONS OF LAND.

As explained in the petition for *certiorari*, some of the courts that have refused to apply the *Nollan-Dolan* requirements to impact fees have viewed such fees as somehow categorically different from mandatory dedications of land. However, no abstract conceptualization or "critical leap" is necessary to equate these economic burdens. *Cf., McCarthy v. City of Leawood*, 894 P.2d 836, 845 (Kan. 1995). Practically speaking, impact fees are simply one variety of exaction. In the land use context they must meet the constitutional requirements set forth in *Nollan* and *Dolan* to make sure that land use regulations do not over-reach by requiring the property owners who need a permit to bear economic costs that should be borne by the public as a whole.

Lingle v. Chevron U.S.A., Inc., 544 U.S. 528 (2005) summarized the kinds of takings that trigger the payment of just compensation. First, the "paradigmatic taking . . . is a direct government appropriation or physical invasion of private property." *Id.* at 537. Second, "government regulation of private property may, in some instances, be so onerous that its effect is tantamount to a direct appropriation or ouster." *Id. Lingle* further clarified the "theories" available for "a plaintiff seeking to challenge a government regulation as an uncompensated taking" (*Id.* at

548) as encompassing regulations which: force a physical occupation, *e.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); deprive a property owner of all economically viable use of the property, *e.g., Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); or "go too far" so as to become the functional equivalent of a traditional taking, *e.g., Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978).

The final category of regulatory taking is "a land-use exaction violating the standards set forth in *Nollan* and *Dolan*." *Lingle*, 544 U.S. at 548. Exactions are a special application of the doctrine of "unconstitutional conditions," which provides that the government may not require a person to give up a constitutional right – such as the right to receive just compensation when property is taken for a public use – in exchange for a discretionary benefit conferred by the government where the benefit has little or no relationship to the property. *Dolan*, 512 U.S. at 385.

The lower courts have developed a detailed understanding of exactions. They come in four recognizable categories: "(1) mandatory dedications of land for roads, schools or parks, as a condition to plat approval, (2) fees-in-lieu of mandatory dedication, (3) water or sewage connection fees, and (4) impact fees." *B.A.M. Development, L.L.C. v. Salt Lake County*, 128 P.3d 1161, 1169 (Utah 2006).

The key to *Dolan*'s application of the Takings Clause to exactions in the land use context is that, in substance, it prevents governments from over-charging new development for the external, public costs it creates. Under *Dolan*, the exaction must be roughly proportional to the impact of the new development, as measured in an individualized determination made by the permitting body. If not proven to be roughly proportional, the Fifth

Amendment requires that compensation be paid for the excess. In this regard, disproportionate impact fees clearly fall within *Dolan*'s ambit just like other forms of exactions.[2]

Under the proper application of *Nollan* and *Dolan*, the "taking" only occurs where, and to the extent that, the monetary exaction exceeds what may be charged to the particular development under the rough proportionality test. Where a monetary exaction goes beyond the impact of the development, the local government is requiring the new development to shoulder a burden that should be borne by the public as a whole, and thus effects a taking. The constitutionally-required just compensation is then a return of that portion of the monetary fee constituting overpayment. In this regard, takings analysis is more finely tuned than substantive due process analysis when applied to impact fees. The former requires that an excess be paid back to the developer but allows the government to keep the justifiable portion of the fee. The latter simply invalidates the entire fee.

Even though this Court has made it clear that takings claims involving land use exactions in the form of physical dedications of property are evaluated under the *Dolan* "rough proportionality" test, the lower courts appear to

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[2] Some argue that five justices in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998) agreed that the Takings Clause did not apply to the mere payment of money, thus resolving the applicability of *Dolan* to impact fees. However, one of the five was Justice Kennedy, who confined his objection to a monetary obligation that was not imposed with respect to or on a particular property. 524 U.S. at 540. Impact fees are, of course, imposed with respect to development that occurs on a particular property, and so Justice Kennedy's opinion in *Eastern Enterprises* did not resolve the issue.

believe that applying *Dolan* to impact fees and monetary exactions "is a complex question and is not completely resolved." *Dudek v. Umatilla County*, 69 P.3d 751, 757 (Ore Ct. App. 2003). *Compare Ehrlich v. City of Culver City*, 12 Cal.4th 854, 911 P.2d 429 (1996), *cert. denied*, 519 U.S. 929 (1996) (at least those monetary land use exactions that are imposed "on an individual and discretionary basis" are subject to *Dolan* scrutiny) *with Town of Flower Mound v. Stafford Estates Limited Partnership*, 135 S.W.3d 620 (Tex. 2004) (all monetary land use exactions are subject to *Dolan*, whether imposed on an individual, discretionary basis or area-wide) *and Twin Lakes Dev. Corp. v. Town of Monroe*, 1 N.Y.3d 98, 105, 801 N.E.2d 821, 825 (2003), *cert. denied*, 541 U.S. 974 (2004); *Smith v. Town of Mendon*, 4 N.Y.3d 1, 12, 822 N.E.2d 1214, 1219 (2004) (*Dolan* scrutiny applies to dedications of land and to fees-in-lieu of land dedications).

This Court should clear the air. From a land owner's perspective, there is no practical distinction between exactions requiring land dedications and exactions requiring the payment of money. Each has an identifiable economic impact on the builder or property owner. Each is susceptible of the same kind of abuse by government. Each can be easily remedied by application of the just compensation requirement. (In fact, it may be easier to require just compensation for monetary exactions than for exactions of real estate. When the latter cannot meet the rough proportionality standard, a court must determine the value of the excess land that was taken by the permitting authority. This step is unnecessary when the taking is accomplished by an excessive fee – all the court need do is order a payment back of the over-charge.)

In the end, "[f]rom the property owner's point of view, it may matter little whether his land" is taken through

conditions that demand disproportionate land dedication or excessive payment of impact fees. See *San Diego Gas & Elec. Co. v. City of San Diego,* 450 U.S. 621, 652 (Brennan, J., plurality dissent), adopted in *First English Evangelical Lutheran Church of Glendale v. Los Angeles County,* 482 U.S. 304 (1987). "[T]he Constitution measures a takings of property not by what a State says, or by what it intends, but by what it *does*." *Hughes v. Washington*, 389 U.S. 290, 298 (1967) (Stewart, J., concurring). This Court should hold that all land use exactions, whether of land or of money, are subject to *Dolan.*

II. THIS COURT NEEDS TO CONFIRM AGAIN THAT THE "ROUGH PROPORTIONALITY" AND INDIVIDUALIZED DETERMINATION REQUIREMENTS OF *DOLAN* APPLY EQUALLY TO LEGISLATIVE EXACTIONS AND TO ADMINISTRATIVE OR QUASI-JUDICIAL EXACTIONS.

This Court should grant *certiorari* in this case and reverse the Washington Supreme Court because that court incorrectly focused on a false distinction between legislative and adjudicative exactions. This Court has not made such a distinction, but instead has previously applied the Takings Clause to legislative actions, both in general and in *Dolan* itself. Nevertheless, the lower courts are confused, and this Court needs to set the record straight.

A. This Court Has Long Recognized the General Principle that Legislation Can Effect a Taking.

This Court has frequently – and recently – held that a legislative enactment can result in an unconstitutional taking. For example, in *Babbitt v. Youpee*, 519 U.S. 234, 243 (1997) and *Hodel v. Irving*, 481 U.S. 704, 716-18 (1987), this Court twice held the escheat provision of the

Indian Land Consolidation Act (25 U.S.C. § 2206) unconstitutional. And, in *Eastern Enterprises v. Apfel*, 524 U.S. 498, 529-37 (1998), the plurality opinion held the application of the Coal Industry Retiree Health Benefit Act of 1922 (2 U.S.C. § 9701-9722) unconstitutional for requiring millions of dollars in health care contributions based on a predecessor company's activities decades earlier. Thus, the notion that government exactions are somehow immune from takings analysis if they are imposed by legislation has no basis as a general principle.

Most of this Court's previous holdings in this regard, however, did not involve exactions in the land use context. Given a plethora of lower court decisions seeking to avoid the mandate of *Dolan*, this Court should now make it clear that exactions that are not roughly proportional to the impact of a proposed development require just compensation, regardless of how the exactions are imposed.

This simple conclusion makes sense. As stated before by Justice Thomas, "It is not clear why the existence of a taking should turn on the type of governmental entity responsible for the taking. A city council can take property just as well as a planning commission can. . . . The distinction between sweeping legislative takings and particularized administrative takings appears to be a distinction without a constitutional difference." *Parking Ass'n of Georgia, Inc.*, 515 U.S. 1116, 1118 (1995) (Thomas, J., dissenting).

B. *Dolan* Itself Involved an Exaction Imposed by Legislation.

The Takings Clause requirement that exactions be roughly proportional was decreed in a case that was itself instigated by a legislative requirement instead of an *ad hoc* administrative determination. At issue in *Dolan* were

dedications required pursuant to the Tigard, Oregon Community Development Code ("CDC"). As this Court explained in *Dolan*:

> The CDC requires property owners in the area zoned Central Business District to comply with a 15% open space and landscaping requirement, . . . The CDC requires that new development facilitate [a plan for a pedestrian/bicycle pathway] by dedicating land for pedestrian pathways where provided for in the pedestrian/bicycle pathway plan."

512 U.S. at 377-78.[3] Thus, the predicate for the numerous decisions which turn on whether the exaction is imposed by legislative or administrative means is not justified by reference to this Court's original decision.

There is, of course, language in *Dolan* that may suggest a distinction between legislative and administrative actions. But it is a false distinction. The language appears in a discussion of cases involving general land use restrictions:

> First, [those cases] involved essentially legislative determinations classifying entire areas of the city, whereas here the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel.

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[3] Some analyses point to footnote 8 in *Dolan*, which states, "Here, by contrast, the City made an *adjudicative decision* to condition petitioner's application for a building permit on an individual parcel." 512 U.S. at 391 (emphasis added). However, Justice Souter, in his dissent, clarified the situation by pointing out that footnote 8 misstated the genesis of the condition: "The majority characterizes this case as involving an 'adjudicative decision' to impose permit conditions [citations omitted], but the permit conditions were imposed pursuant to Tigard's Community Development Code." 512 U.S. at 413, n.*.

512 U.S. at 385. Those seeking to avoid the rough proportionality requirement seize on the above term "legislative determination." But the contrast emphasized by the Court was between *classifications*, on the one hand, and *conditions*, on the other. While the requirement of rough proportionality does not apply to the first (*City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 703 (1999)), it does apply to the second, regardless of whether the condition applies to all properties in an area by legislative decree, or just one property by administrative determination.

C. There is Great Confusion in the Lower Courts.

"The lower courts are in conflict over whether *Dolan*'s test for property regulation should be applied in cases where the alleged taking occurs through an Act of the legislature." *Parking Ass'n of Georgia, Inc.*, 515 U.S. 1116, 1117 (1995) (Thomas, J., dissenting).

The problem is widespread and the consequent results inconsistent. In addition to the cases cited by petitioners, the Illinois Appellate Court held in *Amoco Oil Co. v. Village of Schaumburg*, 277 Ill. App. 3d 926, 941-43, 661 N.E.2d 380, 390-91 (1st Dist. 1995), *leave to appeal denied*, 667 N.E.2d 1055 (Ill. 1996), *cert. denied*, 519 U.S. 976 (1996), that there is no reason to differentiate between exactions imposed legislatively or by adjudication.

On the other hand, cases holding that exactions imposed by legislation need not meet *Dolan*'s rough proportionality test include *Wisconsin Builders Ass'n v. Wisconsin Dep't of Transportation*, 285 Wis.2d 473, 504, 702 N.W.2d 433, 448 (2005); *Wonders v. Pima County*, 89 P.3d 810, 816 (Ariz. Ct. App. 2004); *Homebuilders Ass'n v. Tualatin Hills Park & Recreation Dist.*, 62 P.3d 404, 409 (Ore. Ct. App. 2003); *Home Builders Ass'n v. City of Napa*, 108 Cal.

Rptr.2d 60, 65 (2001), *cert. denied*, 535 U.S. 954 (2002); *Arcadia Dev. Corp. v. City of Bloomington*, 552 N.W.2d 281, 286 (Minn. Ct. App. 1996); and *Harris v. Wichita*, 862 F. Supp. 287, 294 (D. Kan. 1994).

The Supreme Court of Utah called it an "unruly judicial chorus on this issue," but that court found it unnecessary to add its voice because the Utah legislature had stepped in to resolve the issue. *B.A.M. Development, L.L.C. v. Salt Lake County*, 128 P.3d 1161, 1171 (Utah 2006). Utah Code Ann. § 17-27a-507 applies *Dolan*'s rough proportionality test to all exactions, whether imposed legislatively or administratively.[4]

A pending bill in Congress would resolve the issue by applying the constitutional test equally to both legislative and adjudicative exactions, as well as to required dedications of both land and fees. H.R. 4772, The Private Property Rights Implementation Act of 2006, 109th Cong., 2d Sess. (2006).[5] While it passed the Judiciary Committee by voice vote on July 12, 2006, there has not yet been action on H.R. 4772 by the full House.

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[4] The dissent in the Washington Supreme Court in this case believed that the Washington state legislature had likewise applied the *Dolan* rough proportionality test by statute, but the majority held otherwise. *City of Olympia v. Drebick*, 156 Wash.2d 289, 303-04, 320, 126 P.3d 802, 808-09, 817 (2006).

[5] Section 5 of H.R. 4772 provides: "If the party injured seeks to redress the deprivation of a property right or privilege under this section that is secured by the Constitution by asserting a claim that concerns -- (1) an approval to develop real property that is subject to conditions or exactions, then the person acting under color of State law is liable if any such condition or exaction, whether legislative or adjudicatory in nature, including but not limited to the payment of a monetary fee or a dedication of real property from the injured party, is unconstitutional."

One commentator reviewed 29 cases construing *Dolan* and concluded that the lower courts are simply confused. "The survey of the caselaw reveals that the lower courts' application of the legislative/adjudicative distinction is inconsistent." *Note, The Distinction between Legislative and Adjudicative Decisions in Dolan v. City of Tigard*, 75 N.Y.U. L. Rev. 242, 256 (2000). The conflict in the lower courts makes the grant of *certiorari* all the more compelling in this case. *See Parking Ass'n of Georgia, Inc.*, 515 U.S. 1116, 1118 (1995) (Thomas, J., dissenting).

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exactions but not to those imposed by legislative fiat is in fact fraught with practical difficulties. It is also bad public policy, because the distinction allows municipalities the too-easy opportunity to simply push the costs attendant to development on a small number of individuals. Furthermore, in many cases of residential development the payor is an out-of-town corporation and those residents ultimately bearing the cost of the impact fee (through higher home prices) are the buyers of the homes yet to be built – two groups who lack the right to vote in municipal elections.[6] Thus, the idea that the democratic process could be a sufficient check on extortionate impact fees is not supportable. *See Town of Flower Mound*, 135 S.W.3d at 640-41.

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The question of just how much a developer is required to pay when new development is proposed is more than academic. It directly affects the ability and willingness of developers to provide badly needed housing. Economists may argue over just who bears the incidence of exactions – the homebuyer, the developer, or the landowner who sells to the developer – but there is no question that there is an impact. James C. Nicholas, Arthur C. Nelson and Julian Conrad Juergensmeyer, *A Practitioner's Guide to Development Impact Fees* 61-68 (American Planning Ass'n, 1991). Moreover, there is general consensus that it is the homebuyer who ultimately foots the bill for exactions in the long run.[7] Alan A. Altshuler and José A. Gómez-Ibánez, *Regulations for Revenue: The Political Economy of Land Use Exactions* 98 (Brookings Institution/Lincoln Institute of Land Policy, 1993); *Development Exactions* 55 (James E. Frank and Robert M. Rhodes, eds. 1987); and Thomas Snyder, Michael A. Stegman and David H. Moreau, *Paying for Growth: Using Development Fees to Finance Infrastructure* 100 (Urban Land Institute, 1986).

> Through various fees and assessments, as well as requirements for offsite improvements, communities can force developers to pay for infrastructure and public services associated with new development. Using their power to regulate land use, localities have gradually shifted the burden of supplying such infrastructure and services from the community at large to developers. Developers pass the costs along

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[7] Research shows that the average building company makes a net profit of only 5.4% before taxes. NAHB, *Cost of Doing Business: The Business of Building – Measuring Your Success* 7 (2004). Given the narrow profit margin, builders pass on as much of the cost of municipal exactions to home buyers as possible.

> to new homebuyers, in some cases adding substantially to the total cost of new housing.
>
> Impact fees are regressive because they are assessed on a per-unit basis, rather than as a percent of the value of the home. Those who depend on affordable housing are forced to absorb fees that are a substantial percentage of the sales price of any home they purchase. For example, exactions, dedications, and fees account for as much as 30 percent of the cost of housing in New Jersey.
>
> One consequence of high fee schedules is that developers opt to build housing only for the higher end of the single-family market where fees can be absorbed more easily as a proportion of sales price. . . . Those who depend on more affordable housing are clearly disadvantaged when new development shifts to the upper income single-family end of the market.

"Not In My Back Yard," Removing Barriers to Affordable Housing, Report to President Bush and Secretary Kemp by the Advisory Commission on Regulatory Barriers to Affordable Housing, HUD 5806 (1991) at 2-10-11 (footnotes omitted).

The statements contained in *"Not In My Back Yard"* are as true today as in 1991. A California study a decade later confirmed the same conclusion and made several key points.

- California development fees are extremely high. Single-family homebuilders in California in 1999 paid an average of $24,325 per unit in residential development fees, based on the results of a sample of 89 cities and counties. Owners of new infill homes paid an average of

$20,327 per unit. Apartment developers paid an average of $15,351 per new apartment unit.

* * *

- Fee-setting is not routinely linked with capital improvements planning. Local capital facilities fees are usually determined using an average cost methodology, *e.g.*, historical or projected capital costs are divided by the current or project future population to yield a per capita or per household cost. As a result, the link between fees and longterm capital improvements programming (assuming such activities take place) is typically a weak one.

A second issue of concern regarding local development fees concerns their contribution to the high cost of housing. Theory suggests, and some empirical studies demonstrate, that fees contribute directly to higher housing prices, especially during periods of high housing demand. Among the key findings of the research in this area:

- California's high residential development fees significantly contribute to its high housing costs and prices. Among the sample of California jurisdictions, fees account for an average of ten percent of the median price of new single-family homes.

- The contribution of fees to home prices is greatest in affordable markets. Among individual communities in the sample, development fees accounted for less than five percent of new home prices in expensive communities. At the opposite end of the price spectrum, fees accounted for more than 15

> percent of new home prices in many jurisdictions that provide a significant share of their respective region's affordable housing – making the fee issue all the more significant.

John D. Landis, Michael Larice, Deva Dawson and Lan Deng, *Pay to Play: Residential Development Fees in California Cities and Counties, 1999* (Division of Housing Policy Development of the California Department of Housing and Community Development, 2001) at 1-3.

All this in a climate in which California alone will have to produce, on average, 220,000 housing units each year until 2020 just to keep up with the expected growth in population. John D. Landis, *Raising the Roof: California Housing Development Projections and Constraints, 1997-2020* (Division of Housing Policy Development of the California Department of Housing and Community Development, 2000) at 7-1.

It is not just California. A study of housing prices in King County, Washington came to exactly the same conclusion. Shishir Mathur, Paul Waddell and Hilda Blanco, *The Effect of Impact Fees on the Price of New Single-Family Housing*, 41 Urban Studies 1303, 1308-11 (2004). The decision in this case will, if left unchecked, unfortunately make it all the more difficult to obtain affordable housing in that state. Based on recent census data and typical lending practices, each $1,000 increase in the price of a $100,000 house drives 420,000 households out of the home buying market. NAHB, *Determining the Numbers of Households Priced Out of a Market* (2004). Unwarranted exactions on development sooner or later translate into higher home prices, and thus have a direct adverse effect on the nation's supply of affordable housing.

There is no practical way in which badly needed affordable housing can be provided unless the exactions imposed on new developments are limited to those roughly proportional to the impacts they create. This Court should grant *certiorari* to affirm the discipline imposed by the constitution on excessive government impact fees.

CONCLUSION

Developers in general, and NAHB in particular, do not dispute that new development should mitigate the impacts it creates. All that they ask is that they not be required to pay more than an amount roughly proportional to the impacts created – to be required to do no more than mitigate those impacts – which is what *Dolan* stands for. If all that is required to avoid the test of rough proportionality is to enact an exactions rate sheet, then *Dolan's* promise is gutted.

Accordingly, NAHB respectfully requests the Court to grant the petition for writ of *certiorari*, and reverse the decision of the Washington state supreme court.

Respectfully submitted,

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APPENDIX A

Cases in which NAHB has participated in the United States Supreme Court include *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *San Diego Gas and Electric Co. v. City of San Diego*, 450 U.S. 621 (1981); *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986); *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304 (1987); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *Pennell v. City of San Jose*, 485 U.S. 1 (1988); *Yee v. City of Escondido*, 503 U.S. 519 (1992); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Babbitt v. Sweet Home Chapter of Communities for a Greater Ore.*, 515 U.S. 687 (1995); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002); *Borden Ranch P'ship v. U.S. Army Corps of Eng'rs*, 537 U.S. 99 (2002); *City of Cuyahoga Falls v. Buckeye Community Hope Foundation*, 538 U.S. 188 (2003); *So. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004); *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323 (2005); *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005); *Kelo v. City of New London*, 125 S.Ct. 2655 (2005); *S.D. Warren Co. v. Maine Bd. Env'tal Protection*, 126 S.Ct. 1843 (2006); and *Rapanos v. United States*, 126 S.Ct. 2208 (2006).

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On Petition for Writ of *Certiorari*
to the Washington Supreme Court

BRIEF OF *AMICI CURIÆ* NEW ENGLAND LEGAL FOUNDATION, ATLANTIC LEGAL FOUNDATION, AND GREATER BOSTON REAL ESTATE BOARD IN SUPPORT OF PETITIONERS

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MOTION OF *AMICI CURIÆ* NEW ENGLAND LEGAL FOUNDATION, ATLANTIC LEGAL FOUNDATION, AND GREATER BOSTON REAL ESTATE BOARD FOR LEAVE TO FILE BRIEF IN SUPPORT OF PETITIONERS

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Pursuant to Supreme Court Rule 37.2, counsel for *Amici Curiae* have attempted to secure written consent for the filing of the attached *Amicus Curiae* Brief from counsel for the Petitioner and Respondent. Counsel for Petitioner granted such consent and its assent accompanies this motion and brief. Counsel for *Amici* requested assent from counsel for Respondent on September 8, 2006. Counsel for Respondent withheld such assent in a letter that accompanies this Motion and Brief. Accordingly, *Amici Curiae* hereby move this Court for leave to file the Brief of *Amici Curiae* which is submitted herewith. *Amici* make this motion on the following grounds:

NELF is a non-profit, public interest law firm, incorporated in Massachusetts in 1977. It is headquartered in Boston. Its membership consists of corporations, law firms, individuals, and others who believe in NELF's mission of promoting balanced economic growth for the United States and the New England region, protecting the free enterprise system, and defending economic rights. NELF's more than 130 members and supporters include a cross-section of large and small corporations, primarily from New England.

NELF's members are affected by the real estate development climate in New England, which depends, in part, upon the extent to which development is hampered by fees that bear no relationship to any adverse impact of the development. Furthermore, some of NELF's members are directly interested in real estate development because they own, finance, develop, and manage real estate. For those reasons, NELF's members are concerned about the issues presented this case.

NELF has regularly appeared in state and federal courts, as party or counsel, in cases raising issues of general economic significance to the New England and national business communities. *See, e.g., Rapanos v. United States*, 126 S.

Ct. 2208 (2006); *S.D. Warren Co. v. Maine Bd. of Envtl. Protection*, 126 S. Ct. 1843 (2006); *Kelo v. City of New London*, 125 S. Ct. 2655 (2005); *San Remo Hotel, L.P. v. City of San Francisco*, 545 U.S. 323 (2005); *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280 (2005); *Commissioner v. Banks*, 125 S. Ct. 826 (2005); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003); *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000).

Atlantic Legal Foundation ("Atlantic Legal") is a nonprofit public interest law firm whose mandate is to advocate and protect the principles of limited government, the free-market system, and individual rights. One of Atlantic Legal Foundation's abiding concerns has been the protection of property rights. Atlantic Legal has represented property owners in New York in a successful federal court case challenging the constitutionality of the New York Eminent Domain Procedure Law and before this Court has represented associations of small property owners located throughout the United States as *amici* in cases involving regulatory takings and the application of this Court's teachings regarding exactions in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). *See, e.g., Tahoe-Sierra Pre. Council v. Tahoe Envtl. Planning Agency*, 535 U.S. 302 (2002).

The Greater Boston Real Estate Board, founded in 1889, is the oldest Real Estate Trade Association in America. Comprised of almost 8,000 members, it consists of 5 divisions which are involved in developing, managing, buying, selling, leasing and financing real estate development projects. The organizations membership is diverse, comprised of large publicly traded companies, some of which are the largest national producers of commercial and residential rental, and for sale properties. The Real Estate Board's mission is to be a

strong advocate for private property interests, and advance practical and productive land uses policy initiatives in Massachusetts, and New England.

Amici believe that "impact fees" which are not proportional to the actual public burden resulting from the proposed development do not advance a legitimate public purpose, but instead are often a means of raising government revenue so as to offset declining contributions from state and federal sources. As such, they replace generally applicable taxes, and unfairly burden a particular, relatively narrow, segment of the general public.

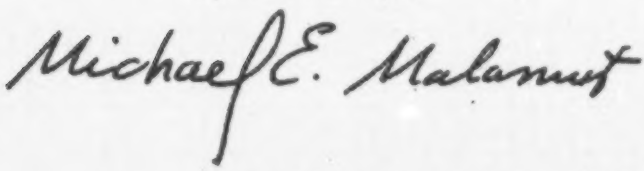
Amici Curiæ therefore believe that this Brief provides an additional perspective, which may aid the Court in determining whether to grant the petition for a writ of *certiorari* of the petitioners, John Drebick *et ux.*, d/b/a Drebick Investments ("Drebick").

Wherefore, *Amici* respectfully request that this Court grant *Amici Curiae* leave to file the attached brief in support of the Petition for a Writ of *Certiorari.*

Respectfully submitted,

NEW ENGLAND LEGAL FOUNDATION,
ATLANTIC LEGAL FOUNDATION, and
GREATER BOSTON REAL ESTATE BOARD

By its attorneys,



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Dated: Sept. 13, 2006

QUESTIONS PRESENTED

Amici Curiæ New England Legal Foundation ("NELF") and Atlantic Legal Foundation ("Atlantic Legal") adopt the statement of questions presented contained in the Brief of Plaintiffs-Petitioners John Drebick *et ux.*, d/b/a Drebick Investments ("Drebick"), as follows:

1. May a local government avoid the "nexus" and "rough proportionality" tests of *Nollan v. California Coastal Commission,* 483 U.S. 825 (1987), and *Dolan v. City of Tigard,* 512 U.S. 374 (1994), by imposing development exactions in the form of "impact" fees?

2. May a local government avoid the "nexus" and "rough proportionality" tests of *Nollan v. California Coastal Commission,* 483 U.S. 825 (1987), and *Dolan v. City of Tigard,* 512 U.S. 374 (1994), by imposing development exactions by legislative enactment?

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BRIEF OF *AMICI CURIÆ* NEW ENGLAND LEGAL FOUNDATION, ATLANTIC LEGAL FOUNDATION, AND GREATER BOSTON REAL ESTATE BOARD IN SUPPORT OF PETITIONER

INTEREST OF *AMICI CURIÆ*

Amici seek to bring to the Court's attention their views, and those of their supporters, concerning the scope of the takings clause under the Fifth and Fourteenth Amendments to the United States Constitution.[1]

NELF is a non-profit, public interest law firm, incorporated in Massachusetts in 1977. It is headquartered in Boston. Its membership consists of corporations, law firms,

1 Pursuant to Supreme Court Rule 37.6, counsel for *Amici* state that neither counsel for Petitioners nor Respondent authored this Brief in whole or in part and no person or entity other than *Amici* made a monetary contribution to the preparation or submission of the brief.

individuals, and others who believe in NELF's mission of promoting balanced economic growth for the United States and the New England region, protecting the free enterprise system, and defending economic rights. NELF's more than 130 members and supporters include a cross-section of large and small corporations, primarily from New England.

NELF's members are affected by the real estate development climate in New England, which depends, in part, upon the extent to which development is hampered by fees that bear no relationship to any adverse impact of the development. Furthermore, some of NELF's members are directly interested in real estate development because they own, finance, develop, and manage real estate. For those reasons, NELF's members are concerned about the issues presented this case.

NELF has regularly appeared in state and federal courts, as party or counsel, in cases raising issues of general economic significance to the New England and national business communities. *See, e.g., Rapanos v. United States,* 126 S. Ct. 2208 (2006); *S.D. Warren Co. v. Maine Bd. of Envtl. Protection,* 126 S. Ct. 1843 (2006); *Kelo v. City of New London,* 125 S. Ct. 2655 (2005); *San Remo Hotel, L.P. v. City of San Francisco,* 545 U.S. 323 (2005); *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.,* 544 U.S. 280 (2005); *Commissioner v. Banks,* 125 S. Ct. 826 (2005); *Green Tree Fin. Corp. v. Bazzle,* 539 U.S. 444 (2003); *EEOC v. Waffle House, Inc.,* 534 U.S. 279 (2002); *Palazzolo v. Rhode Island,* 533 U.S. 606 (2001); *Crosby v. National Foreign Trade Council,* 530 U.S. 363 (2000).

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Amici believe that "impact fees" which are not proportional to the actual public burden resulting from the proposed development do not advance a legitimate public purpose, but instead are often a means of raising government revenue so as to offset declining contributions from state and federal sources. As such, they replace generally applicable taxes, and unfairly burden a particular, relatively narrow,

segment of the general public.

Amici Curiæ therefore believe that this Brief provides an additional perspective, which may aid the Court in determining whether to grant the petition for a writ of *certiorari* of the petitioners, John Drebick *et ux.*, d/b/a Drebick Investments ("Drebick"). Pursuant to Supreme Court Rule 37.2 (b), counsel for *Amici* have bound a motion for leave to file this Brief together with the Brief, as counsel for Respondent have withheld consent for the filing of this Brief.

STATEMENT OF THE CASE

Amici adopt the Statement of the Case contained in the Brief of the Petitioners.

SUMMARY OF ARGUMENT

The Washington Supreme Court erroneously concluded that it could uphold a traffic impact fee that applied uniformly throughout the City of Olympia. This Court should grant the petition for certiorari because the decision below failed to apply *Dolan v. City of Tigard*, 512 U.S. 374, 386 (1994), since the fee was imposed based on the generalized transportation infrastructure needs of a city-wide "service area," rather than the actual adverse transportation impact of the Drebicks' proposal. The decision below deprives the *Dolan* standard of meaning and conflicts with the decisions of other state and federal courts. Moreover, the issue before this Court is not an isolated instance. To the contrary, numerous jurisdictions apply disproportionate exactions with their inherently unfair impact, despite court decisions that have addressed disproportionate impacts clearly and directly.

ARGUMENT

I. Rough proportionality is the touchstone in analyzing government requirements that penalize property owners for engaging in permitted development.

Amici respectfully submit that the application by Respondent City of Olympia ("Olympia") of a traffic impact fee that bears no relationship to the actual traffic impact of the proposed development violates the Takings Clause of the Fifth Amendment to the United States Constitution (as applicable through the Due Process Clause of the Fourteenth Amendment).

The hearings examiner who considered Drebicks' application to build an office building determined that under the Olympia scheme, "'the transportation impact fee assessed [on] a specific development *is used for improvements that will reasonably benefit that development, if benefit is judged by the effect of the transportation improvements in the jurisdiction as a whole.*'" *City of Olympia v. Drebick*, 156 Wash. 2d 289, 305, 126 P.3d 802, 809 (2006), Appendix ("App.") at A-15 (emphasis in citation). *See* App. at E-14, ¶ 34 (hearing examiner's decision). The hearings examiner found, however, that "[e]ven if each of the City's criticisms is accepted, the independent fee calculation [presented by the Drebicks] shows that the Drebick proposal will contribute a miniscule amount of traffic to some of the projects funded by impact fees . . . ." App. at E-15, ¶ 38. The examiner therefore invalidated the $132,328.98 impact fee, as applied to the Drebicks, for failure to take into account the individualized traffic impact of their proposal. App. at E-55.

The hearings examiner's decision was reversed by the Superior Court, App. D, which was in turn reversed by the Court of Appeals (upholding the hearings examiner and

requiring an individualized impact assessment), *City of Olympia v. Drebick*, 119 Wash. App. 774, 83 P.3d 443 (2004), App. C. In a 6–3 split decision, the Washington Supreme Court reversed the Court of Appeals and reinstated the nonproportional impact fee. 156 Wash. 2d 289, 126 P.3d 802, App. A.

The Washington Supreme Court upheld the Olympia traffic impact fee based on the square footage of the Drebicks' proposed new building as commercial space and not on its individualized traffic impact, in part because the fee was "legislative" rather than "adjudicative." *City of Olympia*, 156 Wash. 2d at 293, 126 P.3d 803, App. at A-2. The principal argument of the Washington Supreme Court majority, however, was that exactions analysis under *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), involves only mandated land dedications, and does not apply to impact fees. *City of Olympia*, 156 Wash. 2d at 302, 126 P.3d 808, App. at A-11–12.

Amici contend that an impact fee, such as the traffic fee in this case, that fails to advance its stated goals of alleviating adverse traffic effects of the proposed project, constitutes a regulatory taking under the standards of *Nollan*, 483 U.S. at 834, and *Dolan*, 512 U.S. at 386. Undoubtedly, minimizing traffic impact is a legitimate government purpose. Unless a regulatory land-use exaction (such as a one-time traffic impact fee imposed as a condition for property development) substantially advances its legitimate government purpose the "restriction is not a valid regulation of land use but 'an out-an-out plan of extortion.'" *Nollan*, 483 U.S. at 837 (quoting *J.E.D. Assocs. v. Atkinson*, 121 N.H. 581, 584, 432 A.2d 12, 14–15 (1981)).

In order to advance a legitimate government purpose, a

government imposition on property development must bear some relationship to the public burden caused by the proposed development. In *Dolan*, this Court described the required nexus between a legitimate state interest and the government regulation intended to advance that interest as "rough proportionality." *Id.*, 512 U.S. at 386.

> We think a term such as "rough proportionality" best encapsulates what we hold to be the requirement of the Fifth Amendment. No precise mathematical calculation is required, but the city must make some sort of individualized determination that the [governmental] require[ment] . . . is related both in nature *and extent* to the impact of the [situation giving rise to the desired regulation].
>
> . . .
>
> [T]he city must make some effort to quantify its findings in support of the [regulation] beyond [a] conclusory statement.

Id., 512 U.S. at 391, 395–96 (emphasis added).

Despite the decision of the state supreme court majority below, this case fits easily within the analytical framework of *Nollan* and *Dolan*. The payment of a traffic impact fee is a prerequisite to Olympia's approval of the Drebicks' proposed new building on its property. The minority opinion clearly points out the strong precedents for applying *Nollan/Dolan* exaction analysis to impact fees as well as mandated land dedications. *City of Olympia*, 156 Wash. 2d at 321 & n.14, 126 P.3d at 817; App. at A-35–36 (Sanders, J. dissenting). The dissent further points out that a city-wide monetary imposition on development, made without reference to the impact of the

specific project cannot withstand Takings Clause analysis. *City of Olympia*, 156 Wash. 2d at 319–21, 126 P.3d at 816–18, App. at A-33–36 (Sanders, J. dissenting).

The Washington Supreme Court majority ignores the growing number of courts that have recognized that the property protections enunciated in *Nollan* and *Dolan* would be easily overcome if monetary exactions are exempt from exactions analysis. *See Town of Flower Mound v. Stafford Estates, L.P.*, 135 S.W.3d 620, 639–40 (Tex. 2004) (applying *Nollan* and *Dolan* to impact fees); J. David Breemer, *The Evolution of the "Essential Nexus": How State and Federal Courts Have Applied Nollan and Dolan and Where They Should Go From Here*, 59 Wash. & Lee L. Rev. 373, 390 (2002) (noting "growing recognition that the logic of *Nollan* and *Dolan*" applies to impact fees); Ronald H. Rosenberg, *The Changing Culture of American Land Use Regulation: Paying for Growth with Impact Fees*, 59 SMU L. Rev. 177, 257–59 (2006). Sufficiently high fees could prohibit all "unwanted" development, or could be used to finance the type of "insufficiently related" physical takings invalidated in *Nollan* (beach access) and *Dolan* (dedicated bicycle path).

Both *Nollan* and *Dolan* require a legitimate public purpose and rough proportionality to insure just compensation for regulatory takings under the Takings Clause. A non-proportional development exaction, no matter in what form it is imposed, takes money or property value from a property developer in exchange for government permission to do what the developer is entitled to do—develop his or her property. *See* Carlos A. Ball & Laurie Reynolds, *Exactions and Burden Distribution in Takings Law*, 47 Wm. & Mary L. Rev. 1513, 1520 (2006) ("[W]hether the requirement be that a landowner dedicate an acre of land or pay an amount of money that

equals the cost of an acre of land, the ultimate impact on her is similar."). Such an exaction impermissibly imposes on the individual property developer a burden (*e.g.*, a fee used to improve traffic flow in the municipality generally) that should be borne by society as a whole. *Armstrong v. United States*, 364 U.S. 40, 49 (1960). A proportional exaction, on the other hand, compensates the government for an adverse impact of a property owner's development. A non-proportional fee simply penalizes a developer for exercising his or her development rights and thus constitutes an uncompensated taking of property.

The Washington Supreme Court majority below fails to address this Court's concerns with exactions as regulatory takings. This Court has applied a regulatory takings analysis when a condition for a building permit creates a "heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police power objective." *Nollan*, 483 U.S. at 841. A property owner should be essentially indifferent as between a mandated physical dedication that reduces the value of his or her property and a disproportionate or unrelated impact fee in an equal amount. *See* Inna Reznik, Comment, *The Distinction Between Legislative and Adjudicative Decisions in* Dolan v. City of Tigard, 75 N.Y.U. L. Rev. 242, 274–75 (2000).

The attempted distinction between impact fees and physical exactions drawn by the court below is erroneous because, under *Nollan*, heightened scrutiny applies whenever the government demands a concession as "a condition to the lifting of a land-use restriction." *Nollan*, 483 U.S. at 841. The decision of the Washington Supreme Court below explicitly contradicts the mandate of this Court in *Nollan* and *Dolan* and

therefore merits review and correction.

II. Repeated attempts by local governments to impose disproportionate impact fees in direct conflict with the takings jurisprudence of this Court and lower courts warrants granting *certiorari* in this case.

Pursuant to Supreme Court Rule 10 (b), *certiorari* is appropriate in this case because the decision of the Washington Supreme Court below conflicts with those of other state courts of last resort and federal Courts of Appeals as detailed in the Drebicks' Petition at 8–22. This Court, over dissent, declined to address the application of exactions analysis to impact fees in *Parking Association of Georgia v. City of Atlanta*, 515 U.S. 1116 (1995) (Thomas, J., joined by O'Connor, J., dissenting). Since that time, a number of additional jurisdictions have issued decisions that take differing positions, making a grant of *certiorari* by this Court more significant in resolving an open question of constitutional law. *See Town of Flower Mound*, 135 S.W.3d at 636–37 (reviewing decisions in various states).

In addition, *certiorari* is warranted pursuant to Supreme Court Rule 10 (c) as this case raises an important constitutional issue that this Court should address. Despite the guidance of this Court and lower courts to the contrary, as discussed above, numerous municipalities across the country continue to pass new and higher impact fees that bear no relation to a building project's actual impact. The pressure for lower courts to concede the legitimacy of such action is significant absent clear direction from this Court.

The temptation for municipalities to enact impact fees is understandable. Impact fees provide a way for municipalities to pay for services at a time of decreasing federal and state assistance and strong anti-tax sentiment. Noreen A. Murphy,

Note, *The Viability of Impact Fees after* Nollan *and* Dolan, 31 New Eng. L. Rev. 320, 213–15 (1996). At the same time, impact fees inevitably discourage development, playing to anti-growth sentiment. *Id.* Moreover, developers may have little incentive to challenge impact fees, even when those fees may be constitutionally invalid, because they often can pass them through to the ultimate buyer of the improved property, increasing the cost of all forms of property, including housing.

Although it acknowledged the municipality's "realpolitik" desire to maximize income, the United States Court of Appeals for the First Circuit, referring to *Dolan*, deemed improper a generally applicable impact fee because the "amount bore no relation to the capital expenditures for which [the municipality] could impose [an impact fee] requirement . . . ." *City of Portsmouth v. Schlesinger*, 57 F.3d 12, 17 (1st Cir. 1995). Despite (1) the applicability of *City of Portsmouth* to Massachusetts as a jurisdiction within the First Circuit and (2) voices decrying constitutional problems with non-proportional impact fees, the City of Boston recently raised its "h sing and employment exaction requirements" (also called "linkage fees"). *See* 2001 Mass. Stat. c. 170; 1987 Mass. Stat. c. 371, § 3; *South Boston Betterment Trust v. Boston Redev. Auth.*, 438 Mass. 57 (2002); Stephanie Ebbert, *Council OK's Hike in Linkage*, Boston Globe, Oct. 18, 2001, at B2; Stephanie Ebbert, *Senator Faults Menino's Proposal to Raise Linkage Fees*, Boston Globe, May 15, 2001, at B2 (questioning constitutionality of linkage fees); Editorial, *Menino Finds Ways to Shift City Costs*, Boston Herald, Feb. 18, 2006, at O16 (arguing that increasing linkage fees will "kill this little boomlet [of decreasing vacancy rates] in the cradle"); Anthony Flint, *Doubling of Linkage Fees Faces Scrutiny*, Boston Globe, Sept. 9, 2002, at B1. Numerous other New England municipalities, with or without state statutory

authorization, have likewise adopted non-proportional impact fees. *See Business Roundup*, Providence Journal, Nov. 12, 2005, at B-01 (holding impact fees partly responsible for decline in new housing starts statewide); Fergus Cullen, Op-ed, *Local Planning Boards Choke Growth by Trampling Rights*, Union Leader (Manchester, N.H.), Mar. 1, 2006, at A12 (criticizing impact fees and other planning board tactics for decreasing growth rates); *Ellsworth Panel Reviews Impact Fees*, Bangor Daily News (Me.), Jan. 27, 2005, at B3 (impact fees criticized as "a moratorium against the small guy"); *Parking Impact Fees Target of Petition*, Union Leader (Manchester, N.H.) Sept. 24, 2005, at B1; *Tufts Outreach*, Boston Globe, Oct. 10, 2004 (describing linkage fees in Somerville, Massachusetts, and describing a proposal for a fifty percent increase). Similar to the exactions in this case, many of these "linkage" and impact fees are assessed based on the square footage of the proposed project without regard to actual impact. *See* 2001 Mass. Stat. c. 170, § 4; Flint, *supra*.

In addition, a number of New England states have adopted impact fee statutes similar to the one involved in this case (Wash. Rev. Code § 82.02.050 (3)) that appear, at least superficially, to enforce *Nollan* and *Dolan* by requiring impact fees to be "reasonably related" to the development's share of needed infrastructure improvements. *See* Me. Rev. Stat. tit. 30–A, § 4354; N.H. Rev. Stat. § 674:21; R.I. Gen. Laws § 45–22.4. *See also* Vt. Stat. tit. 24, § 5203 (a) (2) (requiring "reasonable formula" for assessing impact fees). If the state courts in these states follow the lead of the Washington Supreme Court, *City of Olympia*, 156 Wash. 2d at 295–301, 126 P.3d at 804–07, App. at A-4–11, these statutes could be similarly interpreted as permitting generalized impact fees with no relation to the impact of the specific development, contrary to the mandates of *Nollan* and *Dolan*.

In the Mid-Atlantic region, Maryland stands out as imposing particularly high, and grossly uneven, impact fees. Four counties in Maryland—Charles, Frederick, Montgomery and Prince Georges—have impact fees for new construction single family residences that exceed $15,000. *See* Duncan Associates, 2006 National Impact Fee Survey, available at http://www.impactfee.com/2006survey.pdf. These are among the highest in the nation, outstripped only by about two dozen counties in California, and a few in Colorado, and one or two in each of Florida and Oregon. The average impact fee in Maryland is second only to that in California according to a national survey of impact fees. *Id.*

Given the seductive lure of raising funds for needed capital projects without direct costs to taxpayers, municipalities have significant incentives to impose non-proportional impact fees on developers. This tendency can only be reined in by guidance from this Court as to the appropriate circumstances for the imposition of impact fees and the method of determining their proportionality to the alleged harm. *See, e.g.*, Ball & Reynolds, 47 Wm. & Mary L. Rev. at 1513,[2] 1520.[3] *See also*

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2 In the last several decades, there has been a marked shift in local government financing away from the use of general revenue taxes and toward nontax revenue-raising devices such as exactions.

Id. at 1513.

3 The creativity shown by local governments in devising narrow, targeted, nontax finance devices has far outstripped the willingness of state courts to restore principled, limited parameters for those devices.

Id. at 1520.

Rosenberg, 59 SMU L. Rev. at 181,[4] 207,[5] 262.[6] This Court should grant *certiorari* because of the ease with which municipalities can raise funds through impact fees and the practical disincentives for developers to challenge such assessments, despite the fact that non-proportional impact fees stymie development and unfairly condition use of an owner's land. This Court's determination could deter the severe economic distortions caused by non-proportional impact fees in

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4 Increasingly, local governments combine their traditional land use regulatory powers with their authority to impose land development conditions. This practice has become known as requiring "exactions" as a condition of land use approval, often demanding an array of developer on-site and off-site improvements, land dedications, and cash payments made to the locality.

Id. at 181 (footnote omitted)

5 In 2000, the General Accounting Office (GAO) surveyed local governments and discovered high rates of impact fees use. The study found 59.4% or 564 cities with populations in excess of 25,000 and 39% or 238 metropolitan area counties employed impact fees.

Id. at 207.

6 All evidence points to the rapid spread of land development impact fees throughout the nation making it a prevalent means of funding new growth. As local governments become pressed to provide an ever-increasing list of costly services to their citizens while at the same finding their financial resources to be squeezed, impact fees will continue to be an attractive supplement for much-needed revenue. . . . Without having to face the opposition of future residents who do not currently live or vote in the locality, these officials find impact fees an irresistible policy option.

Id. at 262.

the vital real estate development sector.

This case thus raises a matter of national concern that this Court has not previously considered affecting a significant imposition on property development, utilized with increasing frequency by cash-strapped localities. This Court should therefore grant *certiorari* in this case pursuant to Supreme Court Rule 10 (b) because the decision below conflicts with decisions in other jurisdictions and pursuant to Rule 10 (c) because it raises an important question of federal law.

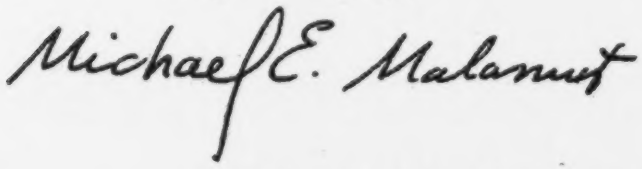
CONCLUSION

For the reasons stated above, this Court should grant Drebicks' Petition for a writ of *certiorari*.

Respectfully submitted,

NEW ENGLAND LEGAL FOUNDATION,
ATLANTIC LEGAL FOUNDATION, and
GREATER BOSTON REAL ESTATE BOARD

By its attorneys,



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